Supreme Court, U.S.
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No._____

IN THE SUPREME COURT OF THE UNITED STATES

MARK PARESI, et al
Petitioner(s)

v.

CITY OF PORTLAND, OREGON
Respondent

On Petition for a Writ of Certiorari to the

United States Court of Appeals for the Ninth Circuit

# PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1) Whether the Department of Labor's regulation 29 C.F.R §541.118(a)(6), relating to the Fair Labor Standards Act, which authorizes employers to correct an inadvertent deduction or a deduction made for reasons other than lack of work in order to preserve the employee's exempt status under the FLSA, is available when an employer has made multiple and/or repetitive improper deductions pursuant to a policy of making such deductions, an issue as to which the court of appeals and the district courts are in conflict?

2) Whether the Department of Labor's interpretation of its own regulations should be given deference by the courts, if the interpretation by the Department of Labor was presented in an amicus brief to this Court and in a separate *amicus* brief to a District Court?

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**IN THE SUPREME COURT OF THE UNITED STATES**
OCTOBER TERM, 1999

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MARK PARESI, et at, Petitioner(s),

v.

CITY OF PORTLAND, OREGON, Respondent

---

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

---

Mark Paresi and other Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

## OPINION BELOW

The opinion of the court of appeals (App., *infra 1)*, is reported at No. 98-35J30, 1999 WL 39499 (9th Cir., April 16, 1999). The opinion of the district court (App., *Infra 7*) is unreported.

## STATEMENT OF JURISDICTION

The Court of Appeals for the Ninth Circuit entered its judgment on April 16, 1999. The jurisdiction of this Court is invoked under 29 U.S.C. §1254(1).

## STATEMENT OF STATUTES, ORDINANCES & REGULATIONS

29 U.S.C. §213(a) provides as follows:

**"Exemptions.**

"(a) Minimum wage and maximum hour requirements

"The provisions of section 206 (except subsection (d) in the case of paragraph (1) of this subsection) and section 207 of this title shall not apply with respect to--

"(1) any employee employed in a bona fide executive, administrative, or professional . . ."

29 C.F.R. §541.118(6) provides as follows:

"Salary basis.

"(6) The effect of making a deduction which is not permitted under these interpretations will depend upon the facts in the particular case. Where deductions are generally made when there is no work available, it indicates that there was no intention to pay the employee on a salary basis. In such a case the exemption would not be applicable to him during the entire period when such deductions were being made. On the other hand, where a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be

considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future."

## STATEMENT OF THE CASE

This case is consolidated from the actions of two groups of employees who brought identical claims against the City. The 35 *Paresi* Petitioners first filed their lawsuit on October 26, 1994, and the 25 *Delk* Petitioners filed their initial suit on December 7, 1994. Each suit alleged that the City inappropriately treated Petitioners as exempt from coverage under the Fair Labor Standards Act (FLSA), 29 U.S.C. §201 et seq., and that the Petitioners are therefore entitled to unpaid overtime compensation for hours worked in excess of 40 per week.

### I. Statement Of Facts.

The two cases were consolidated by the district court on March 6, 1995. The jurisdiction of the district court was conferred by the Fair Labor Standards Act, 29 U.S.C. §216(b). The Respondent, City of Portland (City), is a political subdivision of the State of Oregon and therefore it is subject to the provisions of the FLSA. 29 U.S.C. §203(e)(2)(C).

Prior to 1994, the City's charter and personnel policies specified that the City had the authority to impose unpaid disciplinary suspensions or reductions of pay in less than full workweek increments upon the Petitioners. The *Paresi* Petitioners are employed by the City's Police Bureau. Under the Police Bureau's "Complaint and Disciplinary Process" and the City's general disciplinary rules, these petitioners are subject to suspensions of less than a week without pay for offenses that are unrelated to safety violations.

The *Delk* Petitioners are managerial employees from various City Bureaus. These Petitioners also are subject to the City's general disciplinary policies and the disciplinary policies of the various Bureaus of the City individually for which they are respectively employed. These disciplinary policies provided for disciplinary suspension of less than a week without pay.

Various Bureau managers testified in both depositions and affidavits that they believed they had the authority to discipline salaried employees by imposing suspension without

pay for periods less than a week and that they did impose such disciplinary suspensions. The District Court found that two of the Petitioners had been suspended for periods of less that a workweek resulting in deductions from their pay. Additionally, the District Court found that four others were threatened with suspension, but the suspensions were not imposed.

In 1994, the City adopted a new employment policy which provided that employees it claimed as exempt under the FLSA could not be suspended without pay for increments of less than a workweek. The Human Resources Director for the City testified that this change in policy occurred in response to litigation brought about by exempt employees of the Portland Fire Bureau. In 1997, the City acknowledged that the two actual deductions may have been improper, reimbursed the employees for the invalid deduction, and indicated it would comply with the FSLA in the future.

## II. Proceedings Below

The District Court granted the City's motion for summary judgment. The District Court first held that there were contested issues of fact as to whether Petitioners were salaried employees. In particular, the District Court found there were contested fact issues as to whether the City had a particularized employment policy which subjected Petitioners to disciplinary suspensions without pay in increments of less than a workweek. The District Court found, however, that the City was entitled to use the "window of correction" to avoid liability in this matter. On March 4, 1999, the United States Court of Appeals for the Ninth Circuit affirmed the District Court's ruling, holding that the "window of correction" was available to the City.

## REASONS FOR GRANTING THE WRIT

## THE PETITION SHOULD BE GRANTED BECAUSE OF A CONFLICT IN THE COURTS AS TO WHETHER THE "WINDOW OF CORRECTION" APPLIES WHERE AN EMPLOYER HAS A POLICY OF MAKING IMPROPER DEDUCTIONS FROM AN EMPLOYEE'S PAY

In *Auer v. Robbins*, 519 U.S. 452 (1997), this Court upheld the validity of the Department of Labor's (DOL) regulations concerning exemptions from the FLSA for executive, administrative, and professional employees. Those regulations allow an employer to claim an employee as exempt if the employee is salaried, and if the employee has job duties which qualify for one of the exemptions. Because the *Auer* case involved a substantial question of the propriety of the application of the DOL's regulations to public sector employers, this Court invited the DOL to submit an *amicus* brief explaining its "salary" regulations. In its *amicus* brief, the DOL interpreted the salary basis test to deny exempt status when employees are covered by a policy that permits disciplinary or other deductions in pay "as a practical matter." As adopted by this Court, that standard is met if there is either an actual practice of making such deductions or if an employer has an employment policy that creates a "significant likelihood" of such deductions.

In a separate regulation, the DOL has allowed employers a so-called "window of correction" that applies in some circumstances where an employer has been improperly treating employees as exempt. The "window of correction," not found in the FLSA itself, provides that where the exemption is lost through the making of an inappropriate deduction, the employer may avoid liability by correcting the deduction:

> "The effect of making a deduction which is not permitted under these interpretations will depend upon the facts in the particular case. Where deductions are generally made when there is no work available, it indicates that there was no intention to pay the employee on a salary basis. In such a case the exemption would not be applicable to him during the entire period when such deductions were being made. On the other hand, where a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be lost if the employer reimburses the employee for such deductions and promises to comply in the future." 29 C.F.R. §541.118(a)(6).

Immediately after this Court's approval of the DOL's general salary regulations in *Auer*, questions arose in the lower

courts as to how the "window of correction" applied where an employer had made inappropriate deductions from salary in the past. In *Auer* itself, this Court approved of the use of the "window of correction" by an employer who had made one improper deduction, and who had no particularized policy allowing the making of improper deductions. Nothing in this Court's opinion in *Auer*, however, dealt with the application of the "window of correction" to an employer with a policy that subjected employees to the likelihood of impermissible deductions.

Federal district and appeals courts around the country are in conflict as to whether the "window of correction" applies in cases where an employer's policy subjects employees to the likelihood that impermissible deductions will be made. The Second, Seventh and Tenth Circuits apply a narrow interpretation to the "window of correction" provision, holding that pay deductions made pursuant to a particularized disciplinary policy may not be corrected by application

of the "window of correction." *Klein v. Rush-Presbyterian- St. Luke's Medical Center*, 990 F.2d 279 (7th Cir. 1993); *Spradling v. City of Tulsa, Oklahoma*, 95 F.3d 1492 (10th Cir. 1996); *Martin v. Malcolm Pirnie*, Inc, 949 F.2d 611 (2nd Cir.1991). On the other hand, the Ninth and Eleventh Circuits have held that an employer can preserve the employees' exempt status pursuant to the "window of correction" even when there is an established policy of improper deductions and reoccurring improper deductions have occurred. *Paresi v. City of Portland*, No. 98-35530, 1999 WL 394999 (9th Cir. April 16, 1999) (App. 1); *Davis v. City of Hollywood,* 120 F.3d 1178 (11th Cir. 1997).

The district courts are also in conflict regarding the application of the "window of correction." The district courts in *Arrington v. City Macon*, 973 F.Supp. 1467 (M.D.Ga. 1997), *Kuchinskas v. Broward County*, 840 F.Supp. 1548 (S.D.Fla. 1993), and *Simmons v. Fort Worth, Texas*, 805 F.Supp. 419 (N.D.Tex 1992), have

generally held that the "window of correction" is available to employers regardless of whether the employer has a practice of such deductions. The majority of district courts have held to the contrary. In *Belcher v. Shoney's, Inc.*, 30 F.Supp.2d 1010 (M.D.Tenn. 1998), *Hoffmann v. Sbarro, Inc.*, 982 F.Supp. 249 (S.D.N.Y. 1997), *Muston v. MKI Systems, Inc.*, 951 F.Supp. 603 (E.D.Va. 1997), *Close v. State of New York*, 3 Wage & Hour Cas.2d (BNA) 225 (N.D.N.Y. 1997), *Local 359 Gary Firefighters v. City of Gary, Indiana*, 3 Wage & Hour Cas.2d (BNA) 1846 (N.D.Ind. 1995) have held that the "window of correction" is unavailable to employers that have a disciplinary policy that allows inappropriate deductions. *See Danesh v. Rite Aid Corporation*, 39 F.Supp.2d 7 (D.D.C. 1999); *Rushing v. Shelby County Government*, Docket No. 95-2485-V, 1997 WL 901901 (W.D.Tenn. 1997). And, in apparently the only case on the issue in which the DOL has participated as an *amicus*, (App.

68), *Klem v. County of Santa Clara*, 1998 WL 440425 (N.D.Cal. July 9, 1998), the court adopted the DOL's position that the "window of correction" is unavailable where an employer has a policy that subjects employees to the likelihood of impermissible deductions.

The consequence of allowing employers such as the City in this case to avail themselves of the "window" regardless of the existence of a policy allowing impermissible deductions or the number of impermissible deductions produces illogical results. An employer could impose innumerable impermissible disciplinary suspensions on otherwise exempt employees, could have a clearly articulated policy that effectively communicates to employees that inappropriate deductions will be made, could then wait until the first employees bring a lawsuit against it, reimburse the employees, and promise to comply with the law in the future, thereby avoiding all liability. As the DOL has put it, such an interpretation, adopted by

the Ninth Circuit in this case, would allow employers to be able to flout the salary test, and "[t]he Secretary did not intend to provide employers that engage in a practice of making impermissible deductions under the 'salary basis' test with such an escape hatch." *Secretary of Labor's Brief as amicus curiae at 14-15, Klem v. City of Santa Clara,* 1999 WL 440425 (app. 93).

Not only do the ultimate decisions of courts on the "window of correction" issue differ drastically, so do the approaches taken by the courts to the analysis of the issue. Moreover, the courts' approaches are hallmarked by entirely inconsistent degrees of deference given to the DOL's interpretation of its own regulations.

In *Auer*, this Court ruled that the *amicus* brief submitted by the DOL regarding its interpretation of the "window of correction" regulation should be given great deference. 519 U.S. at 462. Furthermore, this Court held that the DOL's interpretations of its

regulations were to be given no less weight because they were in the form of an *amicus* brief as long as they were not "post hoc rationalization[s]." *Id.* In the *amicus* brief, the DOL noted: "The window of correction is not open when an employer engages in a pattern of improper deductions. The window is open, however, to correct a one-time deduction of less than a week's pay." Secretary of Labor's Brief as Amicus Curiae at 15, *Auer v. Robbins*, 519 U.S. 452 (1997) (No. 1758).

Subsequent to *Auer*, the DOL submitted an *amicus* brief in *Klem v. City of Santa Clara*, *supra*. In the *Klem* brief, the DOL expressly states that the "window of correction" is not open to an employer with a policy of making impermissible deductions:

> "'[T]he window of correction' regulation discusses deductions in the plural when pointing to a situation where there is no intent to pay on a 'salary basis' — 'where deductions are generally made when there is no work available, it indicates that there was no intention to pay the employees on a salary basis.' Whereas the regulation discusses a singular deduction when demonstrating a

> situation where there is an intent to pay on a 'salary basis' — 'on the other hand, where a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost.'" *Secretary of Labor's Brief* at 12 n. 6 (citations omitted)(emphasis in original).

In this case, the Ninth Circuit dismissed in a footnote Petitioners' arguments that the DOL's interpretation of its own regulation should be shown deference. *Paresi*, 1999 WL 394999, at *2 n.2. (App. 5) Though Petitioners discussed the issue extensively before the Ninth Circuit and submitted the DOL's *Klem* brief to the court for consideration, the court failed to even address the impact of the *Klem* brief. *See Danesh v. Rite Aid Corporation*, 39 F.Supp.2d 7 (D.D.C. 1999); *Rushing v. Shelby County Government*, Docket No. 95-2485-V, 1997 WL 901901 (W.D.Tenn. 1997); and *Belcher v. Shoney's, Inc.*, 30 F.Supp.2d 1010 (M.D.Tenn. 1998).

Other cases involving the "window of correction" have given varying degrees of deference to the DOL's interpretation of its regulations. In *Davis v. City of Hollywood*, *supra*, the Eleventh Circuit did not mention Secretary's interpretation of the regulation. The court in *Arrington v. City of Macon*, 973 F.Supp. 1467 (M.D.Ga. Aug. 7, 1997) likewise made no reference to the DOL's interpretation of its regulations. In *Hoffman v. Sbarro*, 982 F.Supp. 249, 257 (S.D.N.Y. 1997), however, the District Court directly based its opinion on the DOL's judgment that the "window of correction" is unavailable to an employer that has a policy of impermissible deductions and has implemented that policy through the making of actual deductions.

The consequence of the inconsistent approach to the DOL's regulations has resulted in the anomalous situation where the DOL has repeatedly stated that its "window of correction" regulation means one thing, but

courts such as the Ninth Circuit in this case have held that the regulation means something quite entirely different. The lack of deference to administrative interpretations of regulations is contrary to the specific holding of this Court in *Auer*, and has led to confusion in the lower courts as to precisely what import agency interpretations of regulations should have. In addition, the lack of deference to agency expertise is contrary to this Court's approach in cases decided over the last five years concerning the appropriate accord courts should give to administrative regulations. *See Auer,* 519 U.S. 905, *Olmstead v. L.C. ex rel. Zimring*, 1999 WL 407380 (U.S.) No. 98-536, *Abbot v. Bragdon*, 524 U.S. 624 (1998), *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984), *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-140 (1944).

Lastly, Petitioners note that the Ninth Circuit's succinct decision in this case is seemingly based on the alternate ground that the presence of two inappropriate

deductions from pay does not suffice to meet the DOL's standard of an impermissible pattern of inappropriate deductions sufficient to deprive an employer of the ability to claim an exemption under 29 U.S.C. §213(a). What the Ninth Circuit failed to address is that this Court held in *Auer* that the talisman for the loss of the §213(a) exempt is when an employer "effectively communicates" to employees that they may be subject to deductions from pay. An employer can make such an effective communication in one of two ways – either by engaging in a pattern of impermissible deductions or by having a particularized policy allowing such deductions. Here, the District Court found that there were disputed issues of fact as to whether the City had a policy allowing such deductions. The Ninth Circuit's comment in its decision that two impermissible deductions did not amount to the requisite pattern of deductions did not address in any fashion the fact that there is significant evidence that the City had an effectively communicated policy of such deductions.

## CONCLUSION

This cases presents two issues of significant importance. First, the lower federal courts are deeply divided as to the appropriate interpretation of the DOL's salary test, and have reached diametrically opposed conclusions based on virtually identical facts. Second, in seeming contravention of this Court's decision in *Auer*, the Ninth Circuit in this case has eschewed reliance on the DOL's interpretation of its own regulation, reaching the conclusion that the regulation does not mean what the DOL adamantly says it means. This failure to accord deference to administrative agency expertise is contrary to a series of this Court's recent decisions. For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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MARK PARESI, et al
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# APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | | |
|---|---|---|
| MARK PARESI, MIKE SHERMAN, MICHAEL CULLIVAN, ALAN ORR, JAMES DELK, and all other similarly situated employees of the City of Portland; DAVID C. CAMPBELL, STEVE HARLEY, | ) | No. 98-35530 |
| | ) | D.C. No. 94-01299-REJ |
| Plaintiffs, | ) | ORDER AND OPINION |
| v. | ) | |
| CITY OF PORTLAND, | | |
| Defendant. | | |

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Appeal from the United States District Court
District of Oregon
Robert E. Jones, District Judge, Presiding

Argued and Submitted March 4, 1999
Portland, Oregon

BEFORE: KLEINFELD and HAWKINS, Circuit Judges, and SCHWARZER,* Senior District Judge

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* The Honorable William W Schwarzer, Senior United States District Judge for the Northern District of California, sitting by designation.

## OPINION

SCHWARZER, Senior District Judge;

Two groups of Portland City employees ("employees") filed suit against the City of Portland ("City") seeking overtime compensation, alleging that the City violated the overtime pay provisions of the Fair Labor Standards Act ("FLSA"), 29U.S.C. §§ 201-219 (1994), and that the City is not entitled to correct the violations under the FLSA's "window of correction." The district court granted the City's motion for summary judgment City's motion for summary judgment, holding that while there was a material issue of fact as to whether the City had violated the FLSA's overtime pay provisions, the City was entitled to invoke the window of correction to avoid liability. We affirm, holding that the window of correction is available to the City.

## BACKGROUND FACTS & PROCEDURAL HISTORY

In 1994, forty-three commanding officers in the Portland Police Bureau filed Paresi v. Portland, alleging a City policy of impermissible reductions in their weekly pay. In 1997, nineteen managerial employees from several other City bureaus filed Delk v. Portland, making the same allegations. The two cases were consolidated by the district court.

Prior to 1994, the City's charter and personnel policies permitted disciplinary suspensions without pay to be imposed on both salaried and nonsalaried employees. Bureau supervisors also testified in depositions and by affidavit that they believed they had the authority to discipline salaried employees by imposing suspensions without pay for periods of less than a week. The district court found that two of the plaintiffs had been suspended for periods of less than a week

resulting in deductions from their weekly pay.[1] Four others were threatened but suspensions were never imposed, while the remaining fifty-seven plaintiffs were neither threatened with nor actually subjected to any impermissible deductions.

In 1994, the City adopted a new employment policy which prohibited any suspensions of FLSA-exempt employees in increments of less than a full week. In 1997, during the course of this litigation, the City acknowledged that the two actual deductions may have been improper, reimbursed the employees, and promised to comply in the future.

The district court granted the City's motion for summary judgment, holding that even if the City had a policy of imposing suspensions of less than a week on otherwise FLSA-exempt employees, it was entitled to resort to the window of correction to avoid overtime liability.

Subject matter jurisdiction arises under 29 U.S.C. §1331 (1994). We have appellate jurisdiction pursuant to 28 U.S.C. §1291 (1994) and affirm.

## DISCUSSION

We review the district court's grant of summary judgment de novo. See Margolis v. Ryan, 140 F.3d 850, 852 (9th Cir. 1998).

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[1] Initially, plaintiffs claimed the City had imposed a total of four improper suspensions without pay. Two of the four, however, were permissible week-long Monday-to-Friday suspensions, and are, therefore, not relevant to whether the City had a practice of improper deductions. See 29 C.F.R. §541.118(a) (1998) ("[A]n employee need not be paid for any workweek in which he performs no work."); Childers v. City of Eugene, 120 F.3d 944, 946 n.2 (9th Cir. 1997) (holding week-long suspensions do not violate the FLSA).

Under the FLSA, covered employers are required to compensate their employees at a rate of at least time and one-half for all hours worked in excess of forty per week, see 29 U.S.C. §207(a)(1), unless the employee works in an "executive, administrative, or professional capacity," 29 U.S.C. §213(a)(1). To be an executive, administrator, or professional, and therefore exempt from overtime, an employee must work "on a salary basis." See id.'; 29 C.F.R. §§541.1-.3, 541.118(a) (1998). Under the so-called "salary basis test," the employee must "receive his full salary for any week in which he performs any work" and his salary may "not [be] subject to reduction because of variations in the quality or quantity of the work performed." 29 C.F.R. §541.118(a). If an employer subjects a salaried employee to an impermissible reduction in his weekly pay, the employee ceases to be overtime-exempt. See id. The employer will then have to pay overtime unless the employer corrects the impermissible deduction through the so-called "window of correction" provided for in the regulations as follows:

> The effect of making a deduction which is not permitted under these interpretations will depend upon the facts in the particular case. Where deductions are generally made when there is no work available, it indicates that there was no intention to pay the employee on a salary basis. In such a case the exemption would not be applicable to him during the entire period when such deductions were being made. On the other hand, *where a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost* if the employer reimburses the employee for such deductions and promises to comply in the future.

29 C.F.R. §541.118(a)(6) (emphasis added).

The employees contend that the window of correction is not available when the employer maintains a "pattern . . . or policy of impermissible disciplinary deductions." The facts found by the district court – coming down to two actual instances of arguably impermissible deductions – would not sustain a finding of such a pattern or policy. In any event, the text of the regulation contains no such limitation. "[T]he plain language of the regulation sets out 'inadverten[ce]' and 'made for reasons other than lack of work' as *alternative* grounds permitting corrective action." Auer v. Robbins, 519 U.S. 452, 463 (1997) (emphasis in original); see also Childers v. City of Eugene, 120 F.3d 944, 947 (9th Cir. 1997) (following Auer and holding that "the window of corrections defense should apply where the deductions in question were either inadvertent or made for reasons other than lack of work") (emphasis in original). The deductions made and corrected by the City were made for disciplinary reasons, which are "reasons other than lack of work" and, thus, are covered by the window of corrections. See also Davis v. City of Hollywood, 120 F.3d 1178, 1180-81 (11th Cir. 1997) (holding window of correction properly invoked by city having broad disciplinary policy permitting suspensions without pay to correct four disciplinary deductions of less than a week);[2] Carpenter v. City & County of Denver, 115 F.3d 765, 767 (10th Cir. 1997) (holding broad disciplinary police and two deductions under unusual circumstances "will not oust exempt status and may be remedied under 29 C.F.R. §541.118(a)(6)").

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[2] Plaintiffs contend that their position is supported by the Department of Labor's ("DOL's") interpretation of its regulation, citing to a portion of an opinion letter quoted in DOL's amicus brief in Auer. We see nothing in the cited matter indicating that DOL adopted the limitation on the availability of the window of correction urged by plaintiffs here, nor was this the issue on which the Supreme Court referred to DOL's amicus brief in Auer.

Application of the window of correction on these facts is consistent with the text of the regulation, with precedent, and with the policy underlying the administration of the salary basis test of "avoid[ing] the imposition of massive and unanticipated overtime liability." Auer, 519 U.S. at 461.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

| | | |
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| MARK PARESI, ET AL., | ) | |
| | ) | |
| Plaintiffs, | ) | Civil No. 94-1299-JO |
| | ) | |
| v. | ) | |
| | ) | OPINION AND ORDER |
| CITY OF PORTLAND, | ) | |
| | ) | |
| Defendant. | ) | |

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JONES, Judge:

In these Fair Labor Standards Act cases (FLSA), plaintiffs seek overtime pay from the City of Portland. The Paresi plaintiffs are all commanding officers of the Portland Police Bureau, while the Delk plaintiffs are managerial employees from several different Portland bureaus. The City contends that the plaintiffs were all exempt from the FLSA's overtime provisions because plaintiffs were, at the relevant times, salaried employees not subject to disciplinary deductions in pay.

This case is now before me pursuant to plaintiffs' motion (#74) for partial summary judgment and defendant's cross-motion (#81) for summary judgment. For the reasons discussed below, I DENY plaintiffs' motion and GRANT defendant's motion.

## FACTS

Plaintiffs are employees of defendant City of Portland. The City is an approximately $1.2 billion a year corporation with over 5,000 employees, who work in over 30 different operating units known as offices or bureaus. Most of the plaintiffs are command officers employed by the Portland

Police Bureau; the rest work for the City's Maintenance, Park, Water, General Service, Finance and Environmental Services Bureaus. The plaintiffs who work for the Police Bureau are members of the Portland Police Commanding Officers Association (PPCOA).

The City operates under a commissioner form of government; there is no City Manager. As such, a particular Commissioner-in-Charge or the Mayor handles direct management of each individual bureau, with the exception of the City Auditor. The Commissioner-in-Charge or the Mayor is responsible for all final management decisions for the bureau(s) within his or her portfolio, including making final decisions with regard to discipline or termination of City employees. However, such disciplinary and termination decisions are subject to the review and approval of the City Attorney's Office and/or the Bureau of Personnel.

In addition to other duties, Mayor Vera Katz is the Commissioner of Finance and Administration, responsible for managing the Office of Finance and Administration, the Bureau of Police, the Bureau of Purchases and Stores, the Office of the City Attorney, the Office of Government

Relations, the Office of International Relations, and the Portland Development Commission. Jim Francesconi is the Commissioner of Public Utilities, responsible for managing the Bureau of General Services, the Bureau of Licenses, and the Bureau of Parks and Recreation, except for GOBI projects. Erik Sten is the Commissioner of Public Works, responsible for managing the Bureau of Environmental Services, the Bureau of Hydroelectric Power, the Bureau of Water Works, the Office of Cable Communications and Franchise Management, and the Portland Energy Office. Gretchen Kafoury is the Commissioner of Public Affairs, responsible for managing the Bureau of Emergency Communications, the Bureau of Fire, Rescue and Emergency Services, the Bureau of Housing and Community Development, and the Office of Neighborhood Associations. Charlie Hales is the Commissioner of Public Safety, responsible for managing the Bureau of Buildings, the Bureau of Parks and Recreation for GOBI projects, the Bureau of Planning, and the Office of Transportation.

The City's policies and procedures on compensation and discipline apply to all employees who work in any of

approximately 400 job classifications, regardless of whether those employees are exempt from the FLSA's overtime provisions. Its compensation policies and procedures are set out in the City Charter, City Code Titles 4 and 5, and the Personnel Manual. Under City Code § 4.08.010, the City Council "fix[es] the salaries of all officers, agents, and employees of the City." For employees who are members of a collective bargaining unit, salaries are determined as a result of negotiations between the applicable union and the City. The only union in the City that is composed exclusively of management-level employees is the PPCOA. Each of the plaintiffs and all other managerial employees that the City considers exempt from the FLSA's overtime provisions receives a salary of more than $250 per week.

Employees' annual salaries, paid on a bi-weekly basis, are broken down into an hourly rate for payroll and leave accounting purposes. City employees receive their biweekly salary every other Thursday. The City pay week runs from Thursday to Wednesday, and under City Code § 5.08.020, the City automatically writes a payroll warrant for active employees whose time report does not deviate from standard

bi-weekly hours. In oral argument, the City admitted that it calculates overtime for its non-FLSA-exempt employees on the basis of this Thursday-to-Wednesday pay week. However, it also represented to the court that the "vast majority" of its FLSA-exempt employees work a Monday-to-Friday week, with Saturday and Sunday as scheduled days off and that many of the remainder work either four 10-hour days with Saturdays, Sundays, and one other day off or five 9-hour days with an extra day off every other week.

Under the City Charter, virtually all City employees are covered by the merit system, sometimes referred to as civil service. Such a system has been in existence in one form or another since the early 1900s. This Charter provides that "no employee holding a permanent position in the classified service shall be demoted, suspended or terminated, except for cause, a written statement of which shall be served upon said employee." However, it does not indicate how such disciplinary actions are to be carried out, nor does it define "for cause." Instead, the Charter requires the Personnel Director to make rules regarding discipline.

The Personnel Director has promulgated rules that

provide that discipline may be in the form of an oral warning, written reprimand, suspension, demotion or dismissal. Discipline is normally progressive, but there is no "lock-step" requirement that any particular level of discipline be imposed for any particular offense. Instead, the supervisor of the offending employee initially decides what level of discipline is appropriate after taking all of the relevant factors into account.

Even if the supervisor initially determines that there is just cause for discharge, however, the Personnel Rules require that certain due process requirements be met before a final decision is reached. Typically, the City Attorney and/or the Bureau of Personnel review and approve the investigation and notice of charges before the employee is notified that he or she is subject to suspension, demotion, or discharge. It is the practice of all City bureaus to consult with the Bureau of Personnel and/or the City Attorney prior to issuing any letter of discipline involving suspension, demotion, or discharge and to have any such discipline carefully reviewed prior to being administered.

If the discipline is approved, the employee is served with a Notice of Proposed Disciplinary Action, which is the

first official statement of the potential penalty for the particular act at issue. The employee then receives an opportunity to tell his or her side of the story at a due process hearing. After the hearing, a final decision is made regarding discipline. At that point, and only at that point, a final decision is made, which can be to withdraw the proposed discipline entirely, to amend the proposed penalty, or to impose the initial proposed penalty. It is not uncommon for the City to decide to impose a lesser form of discipline based on mitigating circumstances.

Until 1994, no written restrictions were in place in the City's disciplinary policies to prevent suspensions or reductions in pay of less than a full workweek for any employee. The City's suspension without pay policy is referred to in section 4-106 of the City's charter and is explained in greater length in section 6-000 of the City's personnel roles, which are applicable to City employees, including the plaintiffs. Sections 2-010, 6-005, and 6-010 of the City's personnel rules also specifically refer to the City's policy of using disciplinary suspensions without pay as part of the available sanctions for a disciplinary offense, and such

sanctions are discussed in the policies for the various City bureaus.

Plaintiffs who are members of the PPCOA can, under the City's general disciplinary roles and G.O. 340.00, receive suspensions without pay for offenses such as unsatisfactory performance, tardiness, unexcused absences from work, taking too long on coffee breaks, sexual or racial harassment, the commission of a crime, the off-duty use of a controlled substance, accepting gratuities, following improper procedures, insubordination, excessive absenteeism, and conduct unbecoming a member of the Police Bureau. The employee handbooks for the City's Bureau of Water Works, its Bureau of Maintenance, and its Office of Transportation specifically list disciplinary sanctions as a consequence of misconduct. In 1990, the Bureau of Parks promulgated a rule regarding regulation of the use of City resources and listed disciplinary suspensions without pay as one consequence for violating the rule. In 1995, similarly, the Bureau of Parks reissued four other policies, and each one listed disciplinary suspensions without pay as a sanction available for violations. However, nothing in these City or Bureau policies mandate or

even suggest imposition of unpaid disciplinary suspensions or reductions in pay in less than full work week increments for any employees.

David Shaff, the City's Human Resources Coordinator, is responsible for tracking all discipline that the City imposes and, as one of two trainers regarding the City's disciplinary policies, maintains a disciplinary log. He has testified, and the City admits, that prior to October 1994, the City suspended employees that it considered exempt from the FLSA's overtime requirements, even where the suspensions were for increments of less than a full workweek. When he became aware of the results of two FLSA cases brought on behalf of exempt employees in Oregon, Shaff prepared City Resolution No. 35326, which changed the City's personnel policies so that FLSA-exempt employees could only be suspended in increments of one week or more. In drafting Resolution No. 35326, Shaff did not consider the relationship between the FLSA's definition of "workweek" and the calendar week notion embodied in the resolution.

On November 2, 1994, the City adopted Resolution No. 35326. Almost immediately, both the Portland

Firefighters Association (PFFA) and the PPCOA challenged the rule's validity on the grounds that the Resolution's change in the disciplinary process was a mandatory subject of bargaining that, under Oregon law, could only be effectuated through collective bargaining between the City and the relevant labor organizations. On October 20, 1995, Oregon's Employment Relations Board (ERB) found in favor of the unions, and the PPCOA and the City thereafter agreed that Resolution No. 35326 would apply to disciplinary matters concerning PPCOA members only for conduct occurring on or after December 9, 1995.

The parties dispute the significance of Resolution 35326's history for PPCOA members. Plaintiffs assert that, for PPCOA members, suspensions without pay for less than one workweek remained part of the City's disciplinary policy prior to December 9, 1995. The City denies this assertion because there had never been a disciplinary suspension without pay for less than a workweek imposed on any member of the PPCOA at any relevant time.

The City has disciplined some FLSA-exempt employees by suspending them for five days, starting on a

Thursday. These disciplinary actions thus impose week-long suspensions that correspond with the City's pay week. In oral argument, plaintiffs conceded that these Thursday-to-Wednesday suspensions do not violate the FLSA's overtime exemption.

In addition, in 1995 the City suspended two FLSA-exempt employees - plaintiff James Delk and "Employee K" - for a work week (Monday through Friday) rather than a pay week (Thursday through Wednesday). Although the City denies that the Monday-through-Friday suspension violated the FLSA, it nevertheless, out of an abundance of caution, "corrected" these potential problems on February 6, 1997 by sending letters of correction to Mr. Delk's attorney and Employee K and by issuing a refund to both employees of the wages withheld pursuant to the suspensions.

Although the parties dispute the significance of other disciplinary suspensions, they essentially agree regarding the facts that show the extent to which the City has ever imposed disciplinary suspensions of less than a workweek on FLSA-exempt employees. Diane Helen Avery, a Human Resources Analyst in the Human Resources Division of the Portland

Police Bureau, has testified by affidavit that in 1987, the Bureau suspended a police officer -- whom the City did not consider to be FLSA-exempt -- for seven days, which was later reduced to two days. In addition, another non-exempt police officer was suspended in 1996. However, Ms. Avery is "not aware of any suspension ever being imposed on an FLSA exempt employee for a preventable vehicle accident."

In September 1991, the Director of the City's Bureau of Maintenance, John Widmer, issued a three-day suspension to plaintiff James Delk. However, the three-day suspension was "for the record" and did not impact plaintiff Delk's salary; instead, Mr. Delk received a letter from Maintenance Services Manager Jeanne Nyquist, Director Widmer, and Commissioner of Public Works Earl Blumenauer stating that "I do not intend to impose this three day suspension without pay." Director Widmer also threatened another FLSA-exempt employee with a suspension but subsequently reduced the sanction to a reprimand.

In November 1992 the City administered a two-day suspension to an FLSA-exempt employee in the Office of Finance and Administration, known for purposes of this

litigation as "Employee E." The City characterizes this incident as an isolated instance that it has corrected; it sent a letter of correction to Employee E on February 6, 1997 and refunded the pay deducted.

Plaintiffs have submitted the deposition testimony of Yvonne Deckard that she has disciplined supervisors or employees exempt from the FLSA" approximately a dozen times, maybe," but the only specific incidents in her testimony that plaintiffs have supplied were a five-day suspension of Employee G in December 1992, a five-day suspension of Employee H in August 1993, and a five-day suspension of Employee I lasting from Thursday morning until Wednesday afternoon. Regarding Employee I, Ms. Deckard indicated that she was unsure of what the logic was in picking those days but that coincidence with the payroll week or fiscal week was not a consideration. Plaintiffs, however, do not state that the disciplinary suspensions imposed on Employee G and Employee H were improper; instead, they argue that Ms. Deckard imposed them without reference to the difference between a work week and a pay week. At oral argument, plaintiffs admitted that Employee G's suspension was for a

major safety violation, and they accepted defendant's representation that Employee H's suspension was from Thursday to Friday. Therefore, the suspensions of Employee G and Employee H are not at issue.

In June 1994, John Lang, the Manager of the City's Combined Sewer Overflow Program in the Bureau of Environmental Services, proposed a week-long suspension for plaintiff Maureen Wright, which was reduced to two and one-half days starting June 28, 1994 because she was placed on a non-disciplinary layoff effective July 1, 1994, when her position was eliminated at the beginning of the City's next fiscal year. The City corrected this incident by refunding to Ms. Wright the two and a half days of wages and sending a letter of correction to her attorney on February 6, 1997.

In addition, Charles Moose, the Chief of Portland's Police Bureau, twice disciplined FLSA-exempt employees. In May 1994, Chief Moose announced his intention to suspend Employee J, a non-sworn employee of the Portland Police Bureau, for two days for a violation of non-safety-related rules; however, no actual suspension without pay occurred, because in July 1994 the employee agreed to forfeit two

vacation days instead. In 1995,Chief Moose suspended Employee K for five days for sexual harassment. The suspension was not for a City pay week, and, in an abundance of caution, the City corrected the situation, as discussed above.

In his deposition, Chief Moose could not recall being told that suspensions of less than one week could violate the FLSA. Stanley Grubbs, currently the Commander of the Police Bureau's Southeast Precinct and formerly a lieutenant in the Bureau's Personnel Division, has testified by affidavit that there are a variety of rule violations that would merit, and have merited, imposition of one- or two-day disciplinary suspensions; that prior to November 1994, these disciplinary standards applied to command officers, who were equally susceptible to disciplinary suspensions of less than five days; and that "[t]he progressive discipline process in effect prior to November 2, 1994 created a strong likelihood that a command officer who committed an offense sufficiently serious to warrant a short suspension in the lower ranks, would have also received a suspension."

Commander Richard Rictor, Commander of the North Precinct in the City's Police Bureau and not a plaintiff in this

lawsuit, has testified in his supplemental affidavit that in June 1996, he recommended that the North Precinct lieutenant known as "C.H.," who is a plaintiff in this law suit, receive a letter of reprimand for his fourth preventable vehicle accident within a four-year period of time and that the Review Level Committee approved that recommendation. Chief Charles Moose reviewed the recommendation and issued the written reprimand, which stated that more accidents "may result in more serious disciplinary action, up to and including discharge." In January 1997, C.H. was involved in another preventable vehicle accident, and on March 11, 1997, Commander Rictor recommended a one-day suspension. However, the Review Level Committee discussed and rejected that recommendation because of a City policy that prohibits suspensions of less than five days for employees who are lieutenants. Moreover, "[o]nce I was reminded of the FLSA policy, everyone acknowledged that was a policy and we needed to discuss the alternatives to a one-day suspension." Chief Moose issued a written reprimand with notice of specific future consequences on April 2, 1997.

Commander Rictor also testified that guidelines for

discipline of traffic accidents for nonexempt police officers can include short suspensions; that he was aware of four short suspensions of non-exempt police officers, three of which occurred in 1995; that prior to Chief Moose's appointment as Chief in 1993, no one was suspended for a preventable minor traffic accident; that "I am not aware of any commanding officer who has been suspended for less than five days for a preventable traffic accident"; and that "I understand that different rules apply to commanding officers concerning discipline under the FLSA." However, he also testified that had C.H.'s misconduct occurred prior to November 1994, the one-day suspension recommendation would have been approved and forwarded to the Chief of Police.

After the parties had filed their motions for summary judgment, defendant took the deposition of Tom Potter, a former officer and Chief of the Portland Police Bureau. Plaintiffs have now submitted this deposition testimony in support of their argument that the City has had a policy of imposing disciplinary suspensions, with deductions of pay, of less than a week on FLSA-exempt employees. Chief Potter testified that he had become a police officer in 1966, made

lieutenant in 1977, was promoted to captain in 1984 and to deputy chief in 1985, was demoted to captain in 1986, and then was promoted to Chief on October 19, 1990. He retired from the Police Bureau on June 30, 1993. He testified further that between 1986 and when he became chief in 1990, disciplinary suspensions without pay could be from one to 30 days in duration; that the Bureau's code of conduct, to his knowledge, did not apply to anyone differently because of that individual's rank; that violating a general order was the type of offense that could receive a disciplinary suspension of less than five days; and that it was his understanding that, in an appropriate case, it was possible for anyone, including a sergeant, a lieutenant, or a captain, to receive a disciplinary suspension of less than five days. However, Chief Potter testified that he did not know whether disciplinary suspensions of less than five days were imposed with any kind of frequency between 1986 and 1990 "because, for the most part, I wasn't in the loop. I was usually out somewhere in the precinct or whatever, and I didn't - I wasn't either paying attention or involved with most of the discipline in the organization. So I really can't answer that." However, he was

aware that the police bureau had issued suspensions of one to four days to different individuals, as a general matter, over time.

Chief Potter testified further that he was comfortable saying that between 1977 and 1990, the basic standards of performance that the Bureau expected of its employees - its written expectations - remained basically the same, although there had been revisions to the disciplinary process to conform with legal developments. Moreover, to the best of Chief Potter's recollection, the range of sanctions that the Bureau could impose, including its ability to impose a suspension of less than five days on a lieutenant or captain, did not change from 1977 through Chief Potter's retirement in 1993. Chief Potter testified further that while he was Chief, from 1990 to 1993, he would generally consult with the City Attorney's office regarding any discipline more severe than a written reprimand, but that he did not remember any discussion about the effect of the FLSA on discipline. As far as he knew, under General Order 340, the Bureau could still impose disciplinary suspensions of less than one week on sergeants, lieutenants, and captains, and he did not remember,

at any time from 1977 until he retired, the Police Bureau announcing that lieutenants and captains could not be subject to disciplinary suspensions of less than five days. However, "I don't remember as a chief imposing any suspension for less than five days on a commanding officer in the bureau."

The Bureau of Police General Order 340 became effective on August 25, 1982 and governs the responsibilities, rights and procedures involved in Bureau discipline. Disciplinary options authorized under General Order 340 include written reprimands, suspensions, demotions, and discharges. Suspensions are defined as "[a]n absence without pay imposed by the Commissioner-in-Charge of the Police Bureau or in lieu thereof; extra duty or loss of vacation or compensatory time as governed by the labor contract." However, although General Order 340 extensively reviews the procedures involved in and the persons responsible for the disciplinary process, it nowhere defines how long disciplinary suspensions can be in general, nor recommends any particular length of disciplinary suspension for any kind of offense.

## DISCUSSION

### A. Standard for Summary Judgment

Summary judgment should be granted if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Cir. P. 56(c). If the moving party shows that there are no genuine issues of material fact, the non-moving party must go beyond the pleadings and designate facts showing an issue for trial. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). A scintilla of evidence or evidence that is merely colorable or not significantly probative does not present a genuine issue of material fact. United Steelworkers of Amer. v. Phelps Dodge Corp., 865 F.2d 1539, 1542 (8th Cir.), cert. denied, 493 U.S. 809 (1989).

The substantive law governing a claim determines whether a fact is material. T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987). Reasonable doubts as to the existence of a material factual issue are resolved against the moving party. Id. at 631. Inferences drawn from facts are viewed in the light most favorable to the non-moving party. Id. at 630-31.

## B. The Fair Labor Standards Act and Overtime Pay

### 1. The FLSA and Its Regulations

Congress enacted the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-219, "to correct and as rapidly as possible to eliminate" "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers * * *." 29 U.S.C. § 202(b), (a). In particular, the Act requires that employers pay overtime compensation in the amount of one and one-half times normal pay to employees who work more than forty hours per week and who are: (1) "engaged in commerce or in the production of goods for commerce;" (2) "employed in an enterprise engaged in commerce or in the production of goods for commerce" that made at least $500,000 or is a construction or reconstruction business; or (3) employed in a business that launders, cleans, or repairs clothing. 29 U.S.C. §§ 207(a)(1), (2); 203(s)(1), (3), (4).

These overtime provisions, however, do not apply, *inter alia,* to "any employee employed in a bona fide executive, administrative, or professional capacity * * *." 29 U.S.C. § 213(a)(1). The Act does not define "bona fide

executive, administrative, or professional capacity;" instead, it delegates explicit authority to the Secretary of Labor to do so. Id.

The Secretary of Labor, in turn, has promulgated an extensive set of regulations defining "employee employed in a bona fide executive, administrative, or professional capacity." See 29 C.F.R. Part 541. The Secretary separately defines "executive," "administrative," and "professional" employees, 29 C.F.R. §§ 541.1, 541.2, 541.3, but imposes similar requirements upon the three in order for an employee to be exempt from the FLSA. In addition to other requirements,[1] for example, executive and administrative employees must be "compensated for [their] services on a salary basis at a rate of not less than $250 per week * * *," 29 C.F.R §§ 541. l(f) (executive), 541.2(e)(1) (administrative). Professional employees must be "compensated for services on a' salary or fee basis at a rate of not less than $250 per week * * *." 29 C.F.R. § 541.3(e).

[1] Many of these other requirements form what is called the "duties" test for this FLSA exemption. However, plaintiffs are not arguing that they do not meet the "duties" test.

Federal regulations also further define what "on a salary basis" means. Thus:

> An employee will be considered to be paid "on a salary basis" within the meaning of the regulation if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed. Subject to the exceptions provided below, the employee must receive his full salary for any week in which he performs any work without regard to the number of days or hours worked. This policy is also subject to the general rule that an employee need not be paid for any workweek in which he performs no work.

29 C.F.R. § 541.118(a) (emphasis added). Employees are not compensated "on a salary basis" if an employer can deduct from that compensation "for absences occasioned by the employer or by the operating requirements of the business," 29 C.F.R. § 541.118(a)(1), or "for absences of an employee caused by jury duty, attendance as a witness, or temporary military leave." 29 C.F.R. § 541.118(a)(4). However, deductions for absences "for personal reasons" do not affect an employee's salaried status, 29 C.F.R § 541.118(a)(2), nor do absences for "sickness or disability * * * if the deduction is

made in accordance with a bona fide plan, policy or practice of providing compensation for loss of salary occasioned by both sickness and disability." 29 C.F.R § 541.118(a)(3). Finally, "[p]enalties imposed in good faith for infractions of safety rules of major significance will not affect the employee's salaried status.[2] 29 C.F.R § 541.118(a)(5).

**2. Application of the FLSA to Municipalities**

It was not immediately clear that the overtime provisions of FLSA and its implementing regulations applied to state and local governments as employers. As initially enacted in 1938, the FLSA did not apply to public employers or employee4. 57 Fed. Reg. 37,666, 37,667-68 (Aug. 19, 1992). In 1974, Congress amended the FLSA to include public employers and employees, but in 1976, the U.S. Supreme Court struck down the amendment because extending FLSA coverage to state and city governmental employees was inconsistent with state sovereignty. National League of Cities v. Usery, 426 U.S. 833 (1976).

Nevertheless, in 1985, the Supreme Court reversed

[2] The parties agree that the City did not impose any of the disciplinary actions that plaintiffs allege violate the FLSA for violations of safety rules.

itself and held that the FLSA did apply to state and local employees. Garcia v. San Antonio Metropolitan Transit Auth., 469 U.S. 528, 555-56 (1985). The Ninth Circuit soon after determined that the Garcia ruling could only be applied prospectively. Austin v. City of Brisbee, Ariz., 855 F.2d 1429, 1432-33 (9th Cir. 1988). As a result, no state or local employee could claim overtime compensation for hours worked before February 19, 1985, the date of the Garcia decision. Id.

Moreover, the Ninth Circuit noted in Austin that after the Garcia decision, "Congress, concerned about the burden states and municipalities would face if suddenly held accountable for overtime under the FLSA, amended the Act to exempt them from compliance until April 15, 1986." Id. at 1434-35 (citing Act of Nov. 13, 1985, Pub. L. No. 99-150, 99 Stat. 787, 1985 U.S. Code Cong. & Admin. News 651). The Ninth Circuit found that Congress intended this amendment to be retroactive, id. at 1435, with the result that state and local governments could not be liable for overtime pay for any hours worked prior to April 15, 1986. Id.

In 1987, the Department of Labor (DOL) realized that

its salary test created problems for state and local governments because state statutes and constitutions often prohibited public employees from being paid for time not actually worked. 56 Fed. Reg. 45824, 45824 (Sept. 6, 1991). As a result:

> The Department initially attempted to address this problem by means of an enforcement policy, adopted by the Wage and Hour Division of January 9, 1987. The policy, which is still in effect, provides that the Division will not deny exemption pursuant to section 13(a)(1) of the FLSA to an otherwise exempt executive, administrative, or professional employee in the public sector whose pay is reduced by deductions for absence(s) of less than a day for personal reasons, or because of illness or accident, because the employee does not have, or has exhausted available paid leave for such absence(s). This policy applies only where applicable State or local law, in effect before April 15, 1986, prohibits payment to employees for such absences which are not covered by paid leave.

Id. However, "[t]he Wage and Hour Division's 1987 enforcement policy does not affect the rights of public employees to file private lawsuits under section 16(b) of the FLSA." Id.

In 1991, the DOL was concerned by "diverging

judicial interpretations" of the FLSA's exemption, which were "resulting in the exposure of governmental employers to potentially enormous and generally unexpected back wage liabilities to employees, some of whom would clearly be exempt if duties and amount of compensation alone were examined." Id. at 45,825. As a result, the DOL concluded "that public sector pay systems must be analyzed differently from, because they are significantly distinguishable from, private sector pay systems. In the Department's judgment, certain aspects of the existing 'salary basis' regulatory requirement for exemption are unduly restrictive when applied in the public sector." Id. To correct the problem, it promulgated a new regulation:

> (a) An employee of a public agency who otherwise meets the requirements of § 541.118 shall not be disqualified from exemption under §§ 541.1,541.2, or 541.3 on the basis that such employee is paid according to a pay system established by statute, ordinance, or regulation, or by a policy or practice established pursuant to principles of public accountability, under which the employee accrues personal leave and sick leave and which requires the public agency employee's pay to be reduced or such employee to be placed on leave without pay for absences for personal reasons or because of illness or injury of less than one work-day when accrued leave is

not used by an employee because -

(1) permission for its use has not been sought or has been sought and denied;

(2) accrued leave has been exhausted; or

(3) the employee chooses to use leave without pay.

(b) Deductions from the pay of an employee of a public agency for absences due to budget-required furlough shall not disqualify the employee from being paid "on a salary basis" except in the workweek in which the furlough occurs and for which the employee's pay is accordingly reduced.

29 C.F.R. § 541.5d.

However, the DOL's concerns did not include disciplinary suspensions without pay, and neither the FLSA regulations nor the FLSA itself specifically deals with that issue. Therefore, although this court remains cognizant of the fact that both Congress and the DOL have treated public employers differently from private employers, it must proceed without benefit of clear statutory or regulatory provisions on this subject.

3. **Auer v. Robbins**

In general, "FLSA exemptions are to be 'narrowly construed against . . . employers' and are to be withheld

except as to persons 'plainly and unmistakably within their terms and spirit.'" Auer v. Robbins, 117 S. Ct. 905, 912 (1997)(quoting Arnold v. Ben Kanowsky, Inc., 361 U.S. 388, 392 (1960)). Nevertheless, the Supreme Court has held that this general role of interpretation does not apply to the "salary basis" regulations, because "[a] rule requiring the Secretary to construe his own regulations narrowly would make little sense, since he is free to write the regulations as broadly as he wishes, subject only to the limits imposed by the statute." Id. Therefore, as discussed above, an employee fails the "salary basis" test for exemption only if he or she is "covered by a policy that permits disciplinary or other deductions in pay 'as a practical matter.'" Id. at 911.

In Auer v. Robbins, police sergeants and a lieutenant sued the police commissioners for overtime pay, and defendants argued that plaintiffs were exempt from the FLSA's overtime pay requirement because they were "bona fide executive, administrative, or professional" employees. 117 S.Ct. at 908. Plaintiffs, in turn, "contended that the salary-basis test was not met in their case because, under the terms of the St. Louis Metropolitan Police Department Manual, their

compensation could be reduced for a variety of disciplinary infractions related to the 'quality or quantity' of work performed." Id. The Eastern District of Missouri and the Eighth Circuit both found that plaintiffs were paid on a salary basis, and the Supreme Court affirmed.

Plaintiffs argued "that because the Police Manual nominally subjects all department employees to a range of disciplinary sanctions that includes disciplinary deductions in pay, and because a single sergeant was actually subjected to a disciplinary deduction, they are 'subject to' such deductions and hence nonexempt under the FLSA." Id. at 910. The Eighth Circuit, according to the Supreme Court, had found that "'[t]he mere possibility of an improper deduction in pay does not defeat an employee's salaried status' if no practice of making deductions exists." Id. (quoting Auer v. Robbins, 65 F.3d 702, 710-11 (8th Cir. 1995)). Moreover, "a 'one-time incident' in which a disciplinary deduction is taken under 'unique circumstances' does not defeat the salaried status of employees." Id, at 910-11 (quoting Auer v. Robbins, 65 F.3d at 711).

In upholding the Eighth Circuit and accepting the

Secretary of Labor's interpretation of the "salary basis" regulation, the Supreme Court evaluated the plaintiffs' claim as follows:

> The policy on which petitioners rely is contained in a section of the Police Manual that lists a total of 58 possible rule violations and specifies the range of penalties associated with each. All department employees are nominally covered by the manual, and some of the specified penalties involve disciplinary deductions in pay. Under the Secretary's view, that is not enough to render petitioners' pay 'subject to' disciplinary deductions within the meaning of the salary-basis test. This is so because the manual does not 'effectively communicate' that pay deductions are an anticipated form of punishment for employees *in petitioners' category,* since it is perfectly possible to give full effect to every aspect of the manual without drawing any inference of that sort. If the statement of available penalties applied solely to petitioners, matters would be different: but since it applies both to petitioners and to employees who are unquestionably not paid on a salary- basis, the expressed availability of disciplinary- deductions may have reference only to the latter. No clear inference can be drawn as to the likelihood of a sanction's being applied to employees such as petitioners. Nor, under the Secretary's approach, is such a likelihood established by a one-time deduction in a sergeant's pay, under unusual circumstances.

Id. at 911-12 (emphasis added). Therefore, plaintiffs here will have to show something more than a generalized

policy that nominally applies to them or an isolated incident of that policy being applied to an FLSA-exempt employee in order to prove that they are not exempt from the FLSA's overtime requirements.

**4. Subsequent Ninth Circuit Decisions**

The Ninth Circuit has applied Auer v. Robbins in two recent published cases. In Childers v. City of Eugene, 120 F.3d 944 (9th Cir. 1997), employees of the City of Eugene sought overtime compensation on the basis that they were not salaried employees and thus not exempt from the FLSA. In 1993, the City suspended an allegedly exempt employee without pay for four hours; however, the City reimbursed the employee in 1995. Id. at 945. As the Ninth Circuit described the facts, arguments, and prior holding:

> Prior to May 23, 1994, the City's policy did not expressly state that exempt employees were subject to suspension without pay. On May 23, 1994, the City changed its disciplinary policy to comply with the requirements imposed by the salary basis test under § 541.118(a), specifically providing that exempt employees are not subject to disciplinary suspensions for a period of less than a week.
>
> Based upon the City's one-time suspension of an exempt employee in violation of the FLSA, [the

> employees] contend that they are entitled to overtime pay under the FLSA because they were "subject to" the possibility of such a suspension in violation of 29 C.F.R. § 541.118(a) and thereby rendered nonexempt employees entitled to overtime compensation. The district court rejected [the employees'] argument stating that "[n]o rational person would conclude, from a four hour suspension of one exempt employee over a ten year period, that all of the City's executive and management employees were really hourly wage earners instead of salaried employees." We affirm the district court and conclude that [the employees'] arguments are foreclosed by the Supreme Court's recent decision in Auer v. Robbins, ---U.S.---, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997).

Id. at 945-46.

Interpreting Auer, the Ninth Circuit emphasized that under the "significant likelihood" test, "the mere fact that the police officers were nominally covered by the Manual and therefore might receive disciplinary deductions in pay was not enough to render them 'subject to' disciplinary deductions within the meaning of the salary basis test." Id. at 946 (citing Auer, 117 S.Ct. at 911). Moreover, "[i]n adopting the Secretary's interpretation, the Court indicated that the 'significant likelihood' test avoided 'the imposition of massive and unanticipated overtime liability. . . in situation in which a vague or broadly worded policy is nominally applicable to a

whole range of personnel but is not 'significantly likely' to be invoked against salaried employees.'" Id. (quoting Auer, 117 S.Ct. at 911). As such, the Ninth Circuit held that the City of Eugene's prior policy - even before it amended that policy to clearly comply with the salary basis test - did not render the employees non-exempt:

> Like the policy at issue in Auer, the City's policy prior to May 23, 1994 was written broadly to cover all regular City employees, both FLSA-exempt and nonexempt. The policy did not explicitly provide that exempt employees were subject to disciplinary deductions in pay. Rather, as in Auer, the policy may have referred only to nonexempt employees. * * * Thus, under the pre-May 23, 1994 policy, exempt employees were "nominally" subject to disciplinary suspensions. Neither the City's policy nor the imposition of disciplinary deductions against a single exempt employee in a ten year period created a substantial likelihood that, or an issue of fact whether, exempt employees were "subject to" such sanctions and therefore rendered nonexempt under the FLSA.

Id. at 947 (citations omitted).

Finally, in Childers, the Ninth Circuit announced that it considers Abshire v. County of Kern, 908 F.2d 483 (9th Cir. 1990), to be overruled. Id. As such, Ninth Circuit jurisprudence established in that FLSA "salary basis" case and

through reliance upon that case is now, at best, suspect.

The next day, the Ninth Circuit decided Stanley v. City of Tracy, 120 F.3d 179 (9th Cir. 1997), in which City of Tracy police department employees sued for overtime pay under the FLSA, contending that they did not meet the salary basis test. Id. at 181. On the basis of Auer v. Robbins, the Ninth Circuit reversed the district court's award of overtime pay, concluding that the employees were paid on a salary basis. Id.

As in these cases, the source of the Stanley dispute was "Personnel Rule 12, which authorizes disciplinary suspensions without pay." Id. at 182. The court noted that the Auer test is met "in one of two circumstances: either when the employer has an actual practice of making such deductions, or when the employment policy at issue 'creates a "significant likelihood" of such deductions.'" Id. at 183-84 (quoting Auer, 117 S.Ct. at 911). Moreover, "[a] policy creates a 'significant likelihood' of impermissible deductions if it '"effectively communicates" that [such] deductions will be made in specified circumstances.'" Id. at 184 (quoting Auer, 117 S.Ct. at 911). However, "[a] written policy which is nominally applicable to all employees, both salaried and non-salaried, and authorizes

deduction which would be proper only for non-salaried employees, does not, without more, communicate as a practical matter that such deductions will be made for employees that otherwise satisfy the salary test." Id. Therefore, the mere existence of Personnel Rule 12 did not eliminate the FLSA exemption. Id.

Moreover, according to the Stanley court, neither the plaintiffs' nor their supervisors' understanding that improper deductions in pay -- specifically, disciplinary suspensions for less than a week -- could be made was dispositive. "The controlling factor is not whether the department head or the employees subjectively believed the employees could be subject to improper deductions"; instead, "the dispositive factors are whether there were either actual deductions, or a significant likelihood of deductions." Id. at 184-85.

Under these guidelines, the Ninth Circuit determined that the Stanley plaintiffs were paid on a salaried basis because "the disciplinary policy nominally covers all city personnel, both salaried and non-salaried"; "[n]o actual suspensions were imposed on any employee in the Mid-Management Unit"; "the policy authorizing suspensions does

not 'effectively communicate' that any employees in the Unit will be suspended in any specified circumstance"; and "[r]ather, the availability under Rule 12 of disciplinary suspensions is at the discretion of the City's personnel officers." Id. at 184-85.

In addition, the Ninth Circuit emphasized that "it was the City Manager's practice to review all disciplinary suspensions with legal counsel and/or the City's Personnel Advisory Board before implementation, to ensure compliance with all applicable laws, including the FLSA." Id. at 185. The City's awareness that it could not suspend a salaried employee for less than a week and its practice of reviewing all suspensions for statutory compliance bolstered the City's argument that it was not "significantly likely" that salaried employees would be subject to an inappropriate suspension.

**C. Application of the FLSA and *Auer* in These Cases**

Plaintiffs' arguments in these cases essentially are that: the City had a long-standing policy of disciplining FLSA-exempt employees through disciplinary suspensions that violate the FLSA salary basis test; and the City actually several times imposed such suspensions on exempt

employees. The disciplinary suspensions at least potentially at issue include: (1) plaintiff Delk's three-day suspension in 1991, which was not actually imposed and for which no pay was deducted; (2) a threatened suspension that was reduced to a reprimand; O) Employee E's two-day suspension in November 1992, which the City corrected in 1997; (4) Employee J's threatened two-day suspension in May 1994, which was never imposed because Employee I forfeited two vacation days instead; (5) plaintiff Wright's five-day suspension in June 1994, which was reduced to two and a half days because her position was eliminated and which the City corrected in 1997; (6) plaintiff Delk's Monday-to-Friday five-day suspension in 1995, which the City corrected out of an abundance of caution in 1997; (7) Employee K's Monday-to-Friday five-day suspension in 1995, which the City against corrected in 1997 out of an abundance of caution; and (8) the recommendation of a one-day suspension on C.H. in March 1997, which was not imposed specifically because such a suspension would violate the FLSA.

**1. Legal Issue #1: Did the City Violate the FLSA**

**Salaried-Employee Exemption When It Imposed Five-Day Disciplinary Sanctions that Did Not Correspond with the City Pay Week (Thursday to Wednesday):**

Plaintiffs make much of the fact that the City has, on at least two occasions, imposed five-day disciplinary suspensions without pay on employees that it considered FLSA-exempt when those suspensions corresponded to the normal work week (Monday through Friday) instead of the City's pay week (Thursday through Wednesday). Such suspensions, plaintiffs argue, violate the FLSA-exempt status because they were, for FLSA purposes, actually two less-than-five-day suspensions in successive pay weeks - that is, each employee received, for FLSA purposes, a three-day suspension from Monday to Wednesday of one pay week and then a two-day suspension from Thursday to Friday in the next pay week.

This court could not find, nor have either of the parties discussed, any federal court decisions discussing this issue. Moreover, nothing in either the FLSA or the DOL's regulations addresses the issue of disciplinary suspensions that result in pay deductions. However, both the FLSA's overtime requirement and the salary basis test are tied to the "workweek." Thus, except as otherwise allowed, "no

employer shall employ any of his employees * * * for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed." 29 U.S.C. § 207(a)(1). Similarly, in order to be exempt from the overtime requirement, salaried employees must receive a predetermined amount of pay that "is not subject to reduction because of variations in the quantity or quality of the work performed," except that salaried employees "need not be paid for any workweek in which he performs no work." 29 C.F.R. § 541.118(a) (emphasis added).

The plain implication of the salary basis regulation is that an employer can suspend an employee for a workweek and not pay the employee for that workweek, without destroying that employee's FLSA-exempt status.[3] However, because a salaried employee must receive his or her full salary in any week in which that employee works any amount of

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[3] The court notes that in Stanley the Ninth Circuit apparently accepted that disciplinary suspensions of a week were not improper deductions for FLSA-exempt employees,
while suspensions of less than a week would be. Stanley v. City of Tracy, 120F.3d at 184.

time, suspensions of less than a workweek that result in a corresponding loss of pay destroy an employee's FLSA-exempt status. However, what exactly constituted a proper FLSA "workweek" was not at issue.

The Act does not define "workweek," although that concept is clearly critical to the Act's overtime requirements. The court invited plaintiffs before oral argument to direct the court's attention to any regulations that equated an FLSA "workweek" to the employer's administrative pay week. At oral argument, plaintiffs addressed a number of regulations, but only to emphasize that "workweek" is a critical concept to the overtime exemption and to the FLSA in general. The court has no dispute with this observation but observes that neither the parties nor the court has been able to find a regulation that explicitly discusses the relationship between the FLSA "workweek" and an employer's administrative pay week. Nevertheless, the DOL's overtime regulations strongly suggest that a workweek need not be the same thing as an employee's pay week. First, all hours for overtime purposes are viewed in units of a single workweek:

> The Act takes a single workweek as its standard and does not permit averaging of hours over 2

> or more weeks. Thus, if an employee works 30 hours one week and 50 hours the next, he must receive overtime compensation for the overtime hours worked beyond the applicable maximum in the second week, even though the average number of hours worked in the 2 weeks is 40.

29 C.F.R. § 778.104. To determine the workweek, the regulations provide that:

> An employee's workweek is a fixed and regularly recurring period of 168 hours - seven consecutive 24-hour periods. It need not coincide with the calendar week but may begin any day and at any hour of the day. For purposes of computing pay due under the Fair Labor Standards Act, a single workweek may be established for a plant or other establishment as a whole or different workweeks may be established for different employees or groups of employees. Once the beginning time of an employee's workweek is established, it remains fixed regardless of the schedule of hours worked by him.

29 C.F.R. § 778.105. The regulations, therefore, allow employers to establish workweeks however they so choose, so long as once established that workweek becomes fixed for a given employee.

Moreover, the regulations seem to contemplate that workweeks and pay periods are independent events. First, section 778.105, quoted above, allows employers to establish different workweeks for different employees. Difficulties in

bookkeeping, however, make it unlikely that such employers would also vary pay periods and pay days in conjunction with these various workweeks.

Second, the Department of Labor has established as a general rule "that overtime compensation earned in a particular workweek must be paid on the regular pay day for the period in which such workweek ends;" "[t]here is no requirement in the Act that overtime compensation be paid weekly." 29 C.F.R. § 778.106. Like section 778.105, this regulation strongly suggests that workweeks and pay periods are separate events, because a workweek can end, according to the regulation, within - as opposed to only at the end of- a particular pay period, and pay periods can overlap one or more workweeks.

Finally, the common meaning of "workweek" describes a period that includes the five days actually worked grouped consecutively. As such, for City employees - such as the "vast majority" of the FLSA-exempt employees - who work Monday through Friday, the common description of their "workweek" would be, for five days, Monday through Friday and for seven days, Sunday through Saturday, regardless of

how the City broke down pay periods for accounting purposes.

Given the Act's focus on workweeks, this court agrees with plaintiffs that disciplinary suspensions of FLSA-exempt employees must correspond with those employees' individual workweeks, just as calculations of overtime pay must correspond to the workweek. I can perceive no requirement, however, that the relevant "workweek" be equivalent to the employee's pay week for either purpose in terms of how accounting is done for pay periods and pay days.

It is clear from the City's briefing that it long considered its "workweek" to be Monday through Friday, at least for its executive and administrative employees who are exempt from the FLSA. Therefore, the City's impositions of five-day suspensions on FLSA-exempt employees lasting from Monday through Friday -- the most common understanding of a five-day "workweek" -- did not constitute improper reductions in pay under the FLSA.

In an attempt to comply with the FLSA, the City has also imposed five-day suspensions that correspond to its pay week, Thursday to Wednesday. The regulations specifically provide that the employer can redefine the workweek, if it

does so permanently. Moreover, given (1) the regulations' lack of clarity regarding the relationship between the workweek and the pay week, and (2) Congress's and the DOL's intentions to protect public employers from unforeseen overtime liability based on hyper-technical constructions of the FLSA, this court refuses to find the plaintiffs non-exempt on the basis that the City has imposed five-day suspensions for both Monday through Friday and Thursday through Wednesday. However, the court strongly suggests that the City formally define its workweek and stick to that definition for all future disciplinary situations.

As a result of this decision, two of plaintiffs' asserted violations -- plaintiff Delk's five-day suspension in 1995 and Employee K's five-day suspension in 1995 -- drop out of these cases.

**2. Legal Issue #2: Did the City Have a Policy of Imposing Disciplinary Suspensions of Less Than a Week on Otherwise FLSA-Exempt Employees?**

As discussed above, under the Auer decision, an employee who meets the duties test fails the salary basis test for FLSA exemption only if he or she is "covered by a policy

that permits disciplinary or other deductions in pay 'as a practical matter.'" Auer, 117 S.Ct. at 911. The Ninth Circuit considers this test met if either the employer has an actual practice of making such deductions or the employment policy creates a significant likelihood of such deductions. Stanley v. City of Tracy, 120 F.3d at 183-84. While neither nominal coverage by a general disciplinary policy nor the plaintiffs' or their supervisors' understanding of what kinds of deductions are possible is sufficient to destroy the FLSA exemption, a policy that "effectively communicates" that disciplinary deductions will be made in certain circumstances can indicate that certain employees were not in fact exempt. Id.

Here, the evidence submitted shows that there is an issue of material fact regarding the City's policy prior to its adoption of City Resolution No. 35326 on November 2, 1994. The City actually imposed a two-day suspension on Employee E in November 1992, effectively imposed a two-and-one-half-day suspension on plaintiff Wright in June 1994, clearly contemplated a three-day suspension of plaintiff Delk in 1991, and threatened at least two other FLSA-exempt employees with suspensions of less than a workweek with the result that

Employee J forfeited two vacation days in May 1994. In addition, Commander Rictor testified -- even in his supplemental affidavit -- that "prior to November 1994, I would have recommended that C.H. receive a one-day suspension, and that recommendation would have been approved by the Review Level Committee and forwarded to the Chief* * *." Nevertheless, the circumstances surrounding plaintiff Wright's suspension indicate that the City intended a five-day suspension and budget concerns interfered. Moreover, three of the other four suspensions never actually resulted in any loss of pay, and plaintiffs could only find six less-than-a-week suspensions or threatened suspensions since 1986. Therefore, a reasonable jury could decide either way on the issue of whether, before it adopted its Resolution, the City had effectively communicated that disciplinary suspensions of less than a workweek would be imposed on FLSA-exempt employees in certain circumstances. Nevertheless, as will be discussed, summary judgment on the pre-1994 claims is still warranted because of the availability of the window of corrections.

After November 2, 1994, however, the record is devoid

of any evidence that the City had a policy that would, as a practical matter, allow suspensions of less than a workweek for FLSA-exempt employees. First, the City enacted Resolution No. 35326, prohibiting suspensions of less than five days for FLSA-exempt employees. Plaintiffs have failed to identify any suspensions imposed on FLSA-exempt employees for less than five days since June 1994, and Commander Rictor's uncontradicted affidavit testimony demonstrates that the disciplinary review process now effectively prevents any inappropriate discipline from being imposed on FLSA-exempt employees. Under the Ninth Circuit's decision in Stanley, moreover, supervisors' beliefs that shorter suspensions can still be imposed are irrelevant. Therefore, the City is entitled to summary judgment for all overtime claims for hours worked from November 2, 1994 forward.

### 3. Legal Issue #3: Does the FLSA's Corrections Window Apply to Eliminate, as a Matter of Law, the *City's* Potential Overtime Liability?

The DOL, in its salary basis regulation, has provided an "escape hatch" for employers who commit minor violations of that regulation.

> The effect of making a deduction which is not permitted under these interpretations will depend upon the facts in the particular case. Where deductions are generally made when there is no work available, it indicates that there was no intention to pay the employee on a salary basis. In such a case, the exemption would not be applicable to him during the entire period when such deductions were being made. On the other hand, where a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future.

29 C.F.R. § 541.118(a)(6). Application of this regulation to the case at hand raises three issues: First, can an employer make use of the "corrections window" even though the employer might have effectively communicated that improper deductions were possible? Second, can an employer avoid FLSA overtime liability by making corrections several years after the deduction was imposed? Finally, does the corrections window allow an employer to correct more than one improper deduction?

**a. The Issue of Fact Regarding Whether the City Had a Policy of Making Deductions Does Not Bar the City from Using the Corrections Window**

In Auer, the Supreme Court held that "the plain language of the [window of corrections] regulation sets out 'inadvertan[ce]' and 'made for reasons other than lack of work' as alternative grounds permitting corrective action." Auer v. Robbins, 117 S.Ct. 905, 912 (1997). In other words, the deduction need not be inadvertent if it was made for reasons other than lack of work See also Childers v. City of Eugene, 120 F.3d at 946 ("The Auer court held that the window of corrections defense should apply where the deductions in question were either inadvertent or made for reasons other than lack of work."). The Ninth Circuit has explicitly overruled its decision in Abshire v. County of Kern, 908 F.2d 483, 488-89 (9th Cir. 1990) that "an employer is not entitled to the window of corrections defense where an employment policy nominally subjects exempt employees to disciplinary suspensions." Childers, 120 F.3d at 949.

Although the Ninth Circuit has not precisely addressed whether the window of corrections is still available when a public employer may have had more than a nominal policy allowing improper deductions, the Eleventh Circuit has addressed facts remarkably similar to those presented here and

has allowed a city to use the corrections window. In Davis v. City of Hollywood, 120 F.3d 1178 (11th Cir. 1997), management-level employees of the City of Hollywood, Florida, filed suit seeking overtime compensation. The City had imposed a total of six disciplinary suspensions on FLSA-exempt employees from 1986 until the date of the court's decision - one for one week, one for two weeks, and four for less than a week. Davis, 120 F.3d at 1180. The City discovered the four short suspensions through an audit performed during the pendency of the lawsuit and reimbursed the four employees; shortly thereafter, it also reimbursed the two employees that had received the week and two-week suspensions. Id. It also adopted a written policy prohibiting unpaid suspensions of management employees. Id. The district court held that the City had made proper use of the window of corrections and granted summary judgment in its favor, which the Eleventh Circuit upheld. Reading section 541.118(a)(6) disjunctively, as the Supreme Court had in Auer the Eleventh Circuit concluded:

> [T]he City made deductions for disciplinary suspensions, not for lack of work, and subsequently reimbursed affected employees and adopted a written

> policy proscribing unpaid suspensions. In our view, no question exists that under the facts of this case the City comes within the protection of the window of correction and thus does not lose the section 213(a)(1) exemption.

Id. at 1180-81 & n.2[4]

Nevertheless, plaintiffs here have submitted the DOL's amicus briefs from Auer and from Klem v. County of Santa Clara, CV No. 91-20674 RMW (N.D. Cal.), submitted to the Northern District of California on November 17, 1997, to argue that the window of corrections is not available if the City had a policy of allowing those deductions. In the Klem brief in particular, the DOL argued that availability of the window of corrections was a question of intent:

> [A]n employer's objective intention to pay the employee on a "salary basis" is determinative of whether an employer can take advantage of the "window of correction." Thus, an employer that engages in a practice of making impermissible deductions in its employees' pay, or has a policy- that is effectively communicated to its employees that such

[4] In the only other appellate case that this court could find that addresses this issue, the Tenth Circuit held that the window of corrections was not available when a city has "at least one settled policy of making improper deductions from the plaintiffs' compensation *(i.e.,* deduction from pay for disciplinary infractions) * * * ." Spradling v. City of Tulsa, Oklahoma, 95 F.3d 1492, 1503-04 (10th Cir. 1996). However, the Tenth Circuit reached this conclusion before the Supreme Court's decision in Auer, and it was following the line of cases - as the Ninth Circuit did in Abshire - that the Auer Court overruled. Therefore, this court considers the Eleventh Circuit's decision more persuasive than the Tenth Circuit's.

> deductions will be made, necessarily has no intention of paying its employee on a "salary basis," and therefore has no recourse to the "window of correction" for actual deductions made.

Like the Auer Court, the Ninth Circuit has indicated that the DOL's official interpretations of the salary basis test are entitled to deference. Boykin v. Boeing Co., 128 F.3d 1279, 1281-82 (9th Cir. 1997) (deferring to a DOL Wage & Hour Division Opinion Letter on actual payment of overtime). However, the DOL's position in litigation is not the same as an official opinion. Moreover, the Auer Court itself provided that federal courts should defer to the DOL's interpretations only so long as those interpretations are not "plainly erroneous or inconsistent with the regulation." Auer, 117 S. Ct. at 910.

The DOL's interpretation above - despite its arguments to the contrary - conflates the "inadvertence" and "made for reasons other than lack of work" prongs of the window of corrections regulation because it effectively requires that all improper deductions be inadvertent - that is, imposed not in accordance with a policy. Its regulation, by contrast, states that, in general, "[t]he effect of making a deduction which is not permitted under these interpretations will depend upon the

facts in the particular case." 29 C.F.R. § 541.118(a)(6). Intention is an issue in the regulation only when an employer makes deductions when no work is available; such deductions "indicate[] that there was no intention no pay the employee on a salary basis." Id. "On the other hand, where a deduction not permitted by these interpretations * * * is made for reasons other than lack of work the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future." Id. (emphasis added). The regulation thus clearly contrasts deductions made for lack of work, which demonstrate a lack of intent to pay employees on a salary basis, and deductions made for other reasons, which do not demonstrate that intent and need not be inadvertent.

In light of the regulation's plain language and the Supreme Court's and Ninth Circuit's disjunctive readings of "inadvertence" and "made for reasons other than lack of work," so that an employer may use the window of corrections if *either* the deductions were inadvertent *or* the deductions were made for reasons other than lack of work, I hold as a matter of law that the City can make use of the window of

corrections to preserve the FLSA exemption even though a reasonable jury could decide that it had a *de facto* policy until November 2, 1994 of allowing suspensions of less than a week for FLSA-exempt employees.

**b. Timing Does Not Bar the City from Using the Window of Corrections**

The Auer, Childers and Davis courts have all allowed cities to make use of the window of corrections even when several years have passed between the suspension and the correction. In Auer the Supreme Court noted that "[t]he language of the regulation * * * does not address the timing of reimbursement, and the Secretary [of Labor's] amicus brief informs us that he does not interpret it to require immediate payment." Auer, 117 S. Ct. at 912. As such, the city was allowed to correct its one-time violation even though it had not done so up until that point. Id. Thus, the city could use the corrections window to avoid liability even though the violation pre-existed the start of the lawsuit in 1988 and was not corrected until after the Supreme Court's decision in February 1997. In Childers, the Ninth Circuit allowed the City of Eugene to use the window of corrections even though the

suspension at issue occurred in 1993 and the correction did not take place until 1995. 120 F.3d at 945, 947. Finally, in Davis as discussed above, the Eleventh Circuit accepted 1994 corrections of suspensions imposed from 1986 until 1994. 120 F.3d at 1180-81. Therefore, I hold as a matter of law that the timing of the City's corrections here - 1997 corrections for suspensions made starting in 1991 - does not bar the City from using the window of corrections to preserve the plaintiffs' FLSA-exempt status.

**c. The Existence of More Than One Improper Deduction Does Not Bar the City from Using the Window of Corrections**

The last issue is whether the City can use the window of corrections for more than one improper deduction. As noted, the Eleventh Circuit has allowed a city to correct *six* deductions that the City was worried might be improper. Davis, 120 F.3d at 1180-81. Plaintiffs, however, argue that the DOL has interpreted section 541.118(a)(6) to allow employers to correct only one improper deduction and that we should defer to that interpretation.

In support of their argument, plaintiffs again rely on the DOL's amicus brief from Klem v. County of Santa Clara,

CV No. 91-20674 RMW (N.D. Cal.). In that case, according to the DOL, it was undisputed that the County of Santa Clara, "pursuant to an established policy, made more than 50 impermissible disciplinary deductions in the pay of its exempt employees" as a result of suspensions for less than a week for reasons other than major safety infractions. Under those facts, the DOL argued that "[t]he 'window of correction' should not be read to allow an employer to retain the statutory exemption from paying overtime compensation, where that employer has engaged in an unmistakable pattern of making impermissible deductions from pay pursuant to an established policy." The DOL further distinguished between a single disciplinary deductions of less than one week's pay - which an employer could clearly correct - and a "pattern of improper deductions," which the employer could not correct. In the DOL's opinion, the County was "precluded from using the 'window of correction' because it clearly engaged in a pattern of improper disciplinary deductions pursuant to an established policy."

Assuming, arguendo, that this court accepts the DOL's interpretation, it does not help the plaintiffs. The DOL has merely stated that the window of corrections is clearly

available when an employer has made a single improper deduction and clearly not available when the employer has made so many deductions (over 50 within six years) that it has engaged in a pattern of making improper deductions. Here, viewing all of the evidence and given my ruling on the five-day suspensions, the parties agree that the City of Portland has *in fact* imposed only two suspensions since 1986 that resulted in improper deductions in pay: Employee E's two-day suspension in November 1992, and plaintiff Wright's two-and-a-half day suspension in June 1994. Moreover, the City has produced uncontroverted evidence that it did not intend plaintiff Wright's suspension to last for less than a week; instead, what started as a five-day suspension became a two-and-a-half day suspension because the fiscal year ended and plaintiff Wright' s position was cut.

Given that the City's pre-October 1994 written policies did not clearly subject FLSA-exempt employees to improper deductions, and despite what may have been a *de facto* acceptance that suspensions of less than five days were possible for FLSA-exempt employees, the City did not, as a matter of law, engage in a pattern of making improper

deductions from the pay of its FLSA-exempt employees through disciplinary suspensions of less than five days. As such, it can use - and has used - the window of corrections to correct its improper deductions, leaving the FLSA-exemption intact for the plaintiffs here. Therefore, plaintiffs are salaried employees not entitled to overtime compensation, and the City's motion for summary judgment must be GRANTED and the plaintiffs' motion for summary judgment must be DENIED.

IT IS SO ORDERED.

DATED this 5th day of May, 1998.

/s/
ROBERT E. JONES
U.S. District Judge

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

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| KATHLEEN KLEM, et al., Plaintiffs, vs. COUNTY OF SANTA CLARA, Defendant. | Nos. C-91-20674 RMW, C-95-20454 RMW Related Cases Secretary of Labor's Brief as Amicus Curiae |
| HAROLD ASSENZA, et al., Plaintiffs, vs. COUNTY OF SANTA CLARA, SANTA CLARA BOARD OF SUPERVISORS, Defendants. | |

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

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| KATHLEEN KLEM, et al., | ) |
| | ) Nos. C-91-20674 RMW, |
| Plaintiffs, | ) C-95-20454 RMW |
| | ) Related Cases |
| VS. | ) |
| | ) Secretary of Labor's |
| COUNTY OF SANTA CLARA, | ) Brief as Amicus Curiae |
| | ) |
| Defendant. | ) |
| | ) |
| HAROLD ASSENZA, et al., | ) |
| | ) |
| Plaintiffs, | ) |
| | ) |
| VS. | ) |
| | ) |
| COUNTY OF SANTA CLARA, SANTA CLARA BOARD OF SUPERVISORS, | ) |
| | ) |
| Defendants. | ) |

INTEREST OF THE SECRETARY OF LABOR

The Secretary of Labor ("Secretary") has a significant interest in these related cases. The issue before this Court is the proper interpretation to be given the

"window of correction," 29 C.F.R. 541.118(a) (6), which, under limited circumstances, provides a means of preserving the statutory exemption from paying overtime compensation for bona fide executive, administrative, or professional employees under the Fair Labor Standards Act ("FLSA" or "Act"), 29 U.S.C. 213(a) (1). Because the "window of correction" is part of the "salary basis" regulation promulgated by the Secretary, 29 C.F.R. 541.118(a), the Secretary's interpretation of the "window" is entitled to considerable deference. See Auer v. Robbins, 117 S.Ct. 905, 911 (1997). In its motion for summary judgment, the County of Santa Clara relies upon the language of the "window of correction," as well as the Supreme Court's decision in Auer, to argue that the "window" is available even when multiple impermissible deductions under the "salary basis" test have been made pursuant to an established policy, provided only that those deductions were "made for reasons other than lack of work," 29 C.F.R. 541.118(a) (6). It is the Secretary's

position that this reading misconstrues both the "window of correction" regulation and the Supreme Court's discussion of that regulation in Auer.

## STATEMENT OF THE ISSUE

Whether the County of Santa Clara can avail itself of the Secretary's regulatory "window of correction" to preserve the statutory exemption from paying overtime compensation under the FLSA when it made, pursuant to an established policy, multiple impermissible disciplinary deductions under the "salary basis" test over approximately a six-year period.

## ARGUMENT

### THE COUNTY OF SANTA CLARA CANNOT UTILIZE THE "WINDOW OF CORRECTION" TO AVOID PAYING OVERTIME COMPENSATION UNDER THE FLSA WHERE IT HAS MADE, PURSUANT TO AN ESTABLISHED POLICY, MULTIPLE IMPERMISSIBLE DISCIPLINARY DEDUCTIONS UNDER THE "SALARY BASIS" TEST OVER APPROXIMATELY A SIX-YEAR PERIOD OF TIME.

### A. Statutory And Regulatory Framework

Under section 7(a) (1) of the FLSA, 29 U.S.C. 207

(a)(1), an employer is required to pay each of its employees overtime compensation "at a rate not less than one and one-half times the regular rate at which he is employed" for every hour worked over forty in a workweek. Section 13(a)(1) of the Act, 29 U.S.C. 213(a)(1), provides an exemption from the overtime provision for "any employee employed in a bona fide executive, administrative, or professional capacity (as such terms are defined and delimited from time to time by regulations of the Secretary)."

Pursuant to this explicit authority to define the limits of the statutory exemption, the Secretary, after providing notice and an opportunity for comment under the Administrative Procedure Act, promulgated regulations setting out a duties test, a salary level test, and a "salary basis" test, all which must be met to show that the employees in question have bona fide executive, administrative, or professional status, and are thereby entitled to the section 13(a)(1) exemption. See 29 C.F.R. 541.1 (executive), 541.2

(administrative), 541.3 (professional), 541.118(a) ("salary basis").

The "salary basis" regulation was promulgated after a Department of Labor report indicated that there was a direct correlation between an employee being paid on a "salary basis" and bona fide executive, administrative, or professional status. See United States Department of Labor, Wage and Hour Division, "Executive, Administrative, Professional . . . Outside Salesman" Redefined, Report and Recommendations of the Presiding Officer at Hearings Preliminary to Redefinition (1940). This rationale for the "salary basis" test was reiterated in a report issued by the Department of Labor after hearings were held in 1947. See United States Department of Labor, Wage and Hour and Public Contracts Divisions, Report and Recommendations on Proposed Revisions of Regulations, Part 541, Defining the Terms "Executive" "Administrative" "Professional" "Local Retailing Capacity" "Outside Salesman" (1949). The "salary

basis" regulation in effect today is the same as that promulgated in 1954. See 19 Fed. Reg. 1321, 4405-06 (1954).

The "salary basis" regulation provides that an employee will be deemed to be paid on a "salary basis" "if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed." 29 C.F.R. 541.118(a) (emphasis added). An employee paid on a "salary basis" must receive his full salary for any workweek in which he performs any work, but need not be paid for any workweek during which he has performed no work. See ibid.

The Secretary enumerated certain exceptions to the "salary basis" test. The exception pertinent to the instant case permits employers to impose penalties "for infractions of

safety rules of major significance" without employees losing their salaried status. 29 C.F.R. 541.118(a)(5). By reference to this disciplinary exception and the general "salary basis" test, an employee will not be considered to be salaried if he is suspended for less than a full workweek because he violated anything other than a major safety rule.

Finally, the "salary basis" test provides a "window of correction." See 29 C.F.R. 541.118(a)(6). Since the resolution of the case before this Court turns on the correct interpretation of this provision, it is worth quoting in its entirety:

> The effect of making a deduction which is not permitted under these interpretations will depend upon the facts in the particular case. Where deductions are generally made when there is no work available, it indicates that there was no intention to pay the employee on a salary basis. In such a case the exemption would not be applicable to him during the entire period when such deductions were being made. On the other hand, where a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have

> been lost if the employer reimburses the employee for such deductions and promises to comply in the future.

29 C.F.R. 541.118(a) (6) (emphases added).

B. The "Window Of Correction" Is Closed To The County Of Santa Clara Because It Made Multiple Impermissible Disciplinary Deductions Pursuant To An Established Policy Over Approximately A Six-Year Period.

It is undisputed that from September 6, 1991 to the present, the County of Santa Clara ("County"), pursuant to an established policy, made more than 50 impermissible disciplinary deductions in the pay of its exempt employees, i.e., suspensions for less than a week for reasons other than major safety infractions. See Defendants' Motion for Summary Judgment in Klem and Assenza Cases at 7 (8/1/97) ("During the six-year period from September 6, 1991 through the present, 54 of the County's 5,230 exempt employees received disciplinary suspensions [for non-major safety violations] not precisely coinciding with a complete

workweek.") (footnote omitted).[1] The "window of correction" should not be read to allow an employer to retain the statutory exemption from paying overtime compensation, where that employer has engaged in an unmistakable pattern of making impermissible deductions from pay pursuant to an established policy. This interpretation is supported by reading the "window of correction" regulation in context, and it is not in tension with the Supreme Court's discussion of the "window" in Auer.

In Auer, the Supreme Court accorded an extraordinary degree of deference to the Secretary's

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[1] The County states that of these more than 50 improper disciplinary deductions in pay, 13 were from the approximately 900 registered nurses in the Registered Nurses Professional Association (the plaintiffs in the Klem case are or were registered nurses), and 10 were from the approximately 1,000 members of the County Employees Management Association (the plaintiffs in the Assenza case are or were management employees). See Defendants' Motion for Summary Judgment at 7-8. The relevant time period begins to run on September 6, 1991, because the Ninth Circuit held that prior to that date, when the Secretary amended the "salary basis" test for public employees in regard to partial-day deductions for absences, 29 C.F.R. 541.5d, the entire "salary basis" test, including the disciplinary portion, was invalid. See Service Employees Int'l Union, Local 102 v. County of San Diego, 60 F.3d 1346, 1353 (9th Cir. 1995), cert. denied, 116 S. Ct. 774 (1996). The County claims to have changed its policy allowing for impermissible disciplinary deductions on May 21, 1997. See Defendants' Motion for Summary Judgment at 8. In orders issued on April 1, 1996, this Court concluded that the County violated the disciplinary portion of the Secretary's "salary basis" test.

interpretation of her own "salary basis" regulation. The Court stated that "[b]ecause the salary-basis test is a creature of the Secretary's own regulations, his interpretation of it is, under our jurisprudence, controlling unless plainly erroneous or inconsistent with the regulation." Auer, 117 S.Ct. at 911 (internal quotation marks omitted). See also Stanley v. City of Tracy, 120 F.3d 179, 183 (9th Cir. 1997) (recognizing the high level of deference that the Supreme Court in Auer granted to the Secretary's interpretation of her "salary basis" regulation). When laying out this principle of deference, the Supreme Court was specifically addressing the Secretary's interpretation of when an employee's compensation will be considered to have been "subject to reduction" under the "salary basis" test at 29 C.F.R. 541.118(a). However, there can be no doubt that the Court's broad formulation concerning deference applies to the Secretary's interpretation of the "window of correction" as well, since the "window" forms a part of the Secretary's "salary basis" regulation.

Indeed, the Secretary, through the Acting Solicitor General, has already spoken to the proper interpretation to be given to the "window of correction." In her amicus brief filed with the Supreme Court in Auer, the Secretary stated as follows:

> Respondents can correct the single disciplinary deduction of less than one week's pay by satisfying the terms of the "window of correction" regulation. 29 C.F.R. 541.118(a)(6). The window of correction is not open when an employer engages in a pattern of improper deductions. The window is open, however, to correct a one-time deduction of less than one week's pay.

Amicus Brief of the United States in Auer at 15 (emphases added). The Secretary also stated in that same brief that "[t]he 'window of correction' regulation addresses the effect of actual deductions on salaried status, and it makes clear that such deductions result in a loss of the exemption when they demonstrate that the employer has no intent to pay its employees on a salaried basis, and, therefore, to treat them as 'bona fide' executive, professional, or

administrative personnel." Id. at 23-24 (emphasis added). Similarly, "[w]hen the deductions indicate that there was 'no intention to pay the employees on a salary basis,' the exemption is not applicable." Id. at 28 (quoting 29 C.F.R. 541.118(a) (6)).[2]

Consistent with this position is a December 24, 1991 opinion letter issued by the Wage and Hour Division of the Department of Labor. That letter states as follows:

> The effect of making impermissible disciplinary deductions from "salaried" employees is discussed in § 541.118[a](6). Where a one-time disciplinary deduction is made, the exemption will not be considered to have been lost in all workweeks if the employer reimburses the employee for such deduction and agrees to not take any such impermissible deduction in the future. Where disciplinary deductions not permitted by the Regulations occur on a regular and recurring basis (e.g., because of an employer's policy), we would question whether such employees, including all of those in the "class" or "category" of employees affected by such

[2] The Secretary also cited approvingly the Eighth Circuit's conclusion in Auer that "the window of correction 'is not available if the employer has a settled policy of making improper deductions.'" Amicus Brief of the United States in Auer at 28 (quoting Auer v. Robbins, 65 F.3d 702, 711 (8th Cir. 1995), aff'd, 117 S. Ct. 905 (1997)).

> deductions, are actually paid on a salary basis and the exemption may be denied in all workweeks.

Salary Basis, Wage & Hour Manual (BNA) 99:5257 (emphases omitted), quoted in Amicus Brief of the United States in Auer at 28. The Ninth Circuit Court of Appeals has specifically recognized that Wage-Hour opinion letters are entitled to deference. See Boykin v. Boeing Co., No. 96-35482, 1997 WL 657287, at *3 (9th Cir. Oct. 23, 1997) ("The Secretary's interpretation of the salary-basis test as it relates to overtime compensation is articulated clearly in DOL's Opinion letters and is entitled to our court's deference."). The Secretary's interpretation could not be more clear, and under that interpretation, the County is precluded from using the "window of correction" because it clearly engaged in a pattern of improper disciplinary deductions pursuant to an established policy.

The County bases its contrary interpretation on a single sentence in the "window of correction" regulation. It

looks to the last sentence of the "window" provision, which states that the statutory exemption will not be lost if an impermissible deduction "is inadvertent, or is made for reasons other than lack of work." It thus contends that irrespective of the number of deductions taken that are inconsistent with the "salary basis" test, the "window of correction" is nevertheless available if those deductions were "made for reasons other than lack of work." [3] The County further argues that its position is supported by the Supreme Court's decision in Auer, in which the Court concluded that even though the one-time disciplinary deduction at issue in that case was not inadvertent, "the plain language of the ["window of correction"] regulation sets out 'inadverten[ce]' and 'made for reasons other than lack of work' as alternative grounds permitting corrective action." 117 S.Ct. at 912.

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[3] The County has represented in its motion for summary judgment that it has met, or is in the process of meeting, the other conditions of the "window -- reimbursement of the effected employee in the amount of the deduction taken, and promising to comply in the future. As alluded to above, the County maintains that it has changed its policy of permitting improper disciplinary deductions, and states that it is in the process of reimbursing all employees from whom

Neither the "window of correction" regulation itself nor the Supreme Court's discussion of that regulation in Auer supports the County's position.

In interpreting the "window of correction," the County mistakenly concentrates on the individual sentence referred to above, instead of reading the provision as a whole. This methodology leads to an interpretation that not only is at odds with the purpose of the "salary basis" test, but essentially makes a nullity of it. It is axiomatic that a court is not guided "by a single sentence or member of a sentence, but look[s] to the provisions of the whole law, and to its object and policy." John Hancock Mutual Life Insurance Co. v. Harris Trust & Savings Bank, 510 U.S. 86, 94-95 (1993) (internal quotation marks omitted). See also Gade v. National Solid Wastes Management Ass'n, 505 U.S. 88, 99 (1992) (same); Massachusetts v. Morash, 490 U.S. 107, 115 (1989) (same). "Statutory construction . . . is a holistic

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impermissible disciplinary deductions in pay were made. See Defendants' Motion for Summary Judgment at 8.

endeavor." Smith v. United States, 508 U.S. 223, 233 (1993) (internal quotation marks omitted). See also United Savings Ass'n of Texas v. Timbers of Inwood Forest Associates, Ltd., 484 U.S. 365, 371 (1988) (same).[4]

Viewing the "window of correction" provision in its entirety, and as part of the larger "salary basis" test, confirms the Secretary's interpretation set forth above. The "window of correction" regulation begins by stating that the effect of any improper deduction "will depend upon the facts in the particular case." 29 C.F.R. 541.118(a)(6). This highlights the importance of the context in which a deduction is taken. The crux of the regulation is to be found in the next two sentences. They speak of a situation "[w]here deductions are generally made when there is no work available" as "indicat[ing] that there was no intention to pay the employee on a salary basis"; in such a situation "the exemption would not be applicable to him during the entire period when such

[4] By analogy, the same principles may be applied to the interpretation of regulations.

deductions were being made." 29 C.F.R. 541.118(a) (6). In other words, an employer's objective intention to pay the employee on a "salary basis" is determinative of whether an employer can take advantage of the "window of correction." Thus, an employer that engages in a practice of making impermissible deductions in its employees' pay, or has a policy that is effectively communicated to its employees that such deductions will be made,[5] necessarily has no intention of paying its employees on a "salary basis," and therefore has no recourse to the "window of correction" for actual deductions made. When the pay of a class of employees is "subjeet to reduction," as explained in Auer, 117 S.Ct. at 911, there is no intention to pay that class of employees on a "salary basis" in the first place, and the "window" is therefore shut.

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[5] This is how the Supreme Court in Auer, adopting the position set forth in the Secretary's amicus brief, defined the term "subject to reduction" in the "salary basis" test at 29 C.F.R. 541.118(a). "The Secretary's approach rejects a wooden requirement of actual deductions, but in their absence it requires a clear and particularized policy -- one which 'effectively communicates' that deductions will be made in specified circumstances." Auer, 117 S. Ct. at 911.

The fourth and final sentence of the provision, and the one upon which the County stakes its entire argument, emphasizes the importance of an employer's intention to pay its employees on a "salary basis" for purposes of using the "window of correction." That sentence, which begins by stating, "[o]n the other hand," cannot be read without reference to the two sentences that precede it. See 29 C.F.R. 541.118(a) (6). And when these sentences are read together, it becomes manifest that only when an employer has demonstrated an intention to pay its employees on a "salary basis," which cannot be shown when there is an actual practice of making impermissible deductions from pay, is the "window of correction" available. The two kinds of deductions referenced in the latter sentence -- a deduction that is "inadvertent" or one that "is made for reasons other than lack of work" -- do not alter this overriding principle.[6]

[6] The "window of correction" regulation simply does not support the argument that, regardless of the number of deductions "made for reasons other than lack of work," the "window" is available. Both the structure and the content of the regulation refute this contention. It is worth noting in this regard that the

Policy considerations also support the Secretary's position. Exemptions to the dictates of the FLSA, such as the section 13(a) (1) exemption from paying overtime compensation, are to be construed narrowly against the employer attempting to utilize them. See Moreau v. Klevenhagen, 508 U.S. 22, 33 (1993); Arnold v. Ben Kanowsky, Inc., 361 U.S. 388, 392 (1960); A.H. Phillips, Inc. v. Walling, 324 U.S. 490, 493 (1945). Therefore, the "window of correction," which allows an employer to preserve the section 13(a) (1) exemption, should be interpreted narrowly. The Secretary's reading of the "window" comports with this general principle.

Moreover, permitting the "window of correction" to be used without regard to the number of impermissible

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"window of correction" regulation discusses deductions in the plural when pointing to a situation where there is no intent to pay on a "salary basis" -- "Where deductions are generally made when there is no work available, it indicates that there was no intention to pay the employee on a salary basis." 29 C.F.R. 541.118(a) (6) (emphasis added). Whereas the regulation discusses a singular deduction when demonstrating a situation where there is an intent to pay on a "salary basis" -- "On the other hand, where a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost." Ibid. (emphasis added). The Secretary does not here propose what specific number of impermissible deductions for a class of employees is necessary to subject the pay of an employee within that class to reduction under the "salary basis" test as set out in Auer. This is a factual determination best left to the trial courts. However, the undisputed facts of this particular case clearly indicate that employees' pay was "subject to reduction," thereby closing the "window."

deductions taken under the "salary basis" test, as long as those deductions were "made for reasons other than lack of work" and the employer reimburses employees for those deductions and promises future compliance, would render the "salary basis" test virtually meaningless.[7] Under this scenario, an employer would be able to treat its otherwise exempt "executive, "administrative, or "professional" employees as nonsalaried by impermissibly subjecting their pay to reduction, not pay those employees the requisite overtime compensation to which nonexempt employees are entitled under the FLSA, and then wait and see if legal action is initiated against it. If it is, the employer could preserve the exempt status of the entire class of employees whose pay was impermissibly "subject to reduction" under the "salary basis" test merely by reimbursing those employees from whom deductions in pay were actually made, and by promising to comply in the future. An employer could thus retroactively take advantage of the statutory exemption from paying overtime compensation irrespective of how

[7] Disciplinary deductions, which are at issue in this case, are necessarily deductions "made for reasons other than lack of work."

egregiously it flouted the "salary basis" test. The Secretary did not intend to provide employers that engage in a practice of making impermissible deductions under the "salary basis" test with such an escape hatch.[8]

Contrary to the position taken by the County, the Supreme Court's decision in Auer is not in any way inconsistent with the Secretary's position as to the "window of correction." In Auer, the Supreme Court addressed the applicability of the "window of correction" to the specific facts of that case -- a one-time impermissible disciplinary deduction. It did not address the issue before this Court -- the applicability of the "window of correction" to a situation where numerous impermissible disciplinary deductions have been made pursuant to an established policy allowing for such deductions. Given the one-time impermissible disciplinary deduction with which it was faced, the Supreme

[8] Another possible incongruous result of the County's position is that those employers that actually engage in a practice of making improper deductions under the "salary basis" test "for reasons other than lack of work" would be in a better position than those employers that have a policy which "effectively communicates" to employees that impermissible deductions will be taken, but which have not made any such deductions. Since the "window of correction," by its terms, corrects only actual deductions taken, the employer in the former situation would have the opportunity to restore exempt status for the relevant class of employees, whereas the employer in the latter situation would not have such an opportunity.

Court agreed with the Secretary's position, advanced in her amicus brief, that the "window" should apply. The Court did not take issue with the Secretary's statement that the "window of correction" should not be available "when an employer engages in a pattern of improper deductions," Amicus Brief of the United States in Auer at 15. Nor did the Court disagree with the statement of the Eighth Circuit, whose judgment it affirmed, that "[t]he 'window of correction' is not available if the employer has a settled policy of making improper deductions from compensation." Auer, 65 F.3d at 711.

The Supreme Court recognized the importance of an employer's intention to pay employees on a "salary basis" with respect to the availability of the "window of correction." In referring to the Secretary's "window of correction" regulation, it first pointed to that part of the provision stating that the "window" is not available if deductions inconsistent with the "salary basis" test are made in circumstances indicating a lack of intent to pay the

employees on a "salary basis." See Auer, 117 S.Ct. at 912.[9] The Court proceeded to state that "[c]onversely, 'where a deduction not permitted by [the salary-basis test] is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost.'" Ibid. (quoting 29 C.F.R. 541.118(a) (6)) (emphasis added). Thus, the Supreme Court recognized the necessary connection between an employer's intention to pay on a "salary basis" and the availability of the "window of correction." The Court's conclusion that the one-time impermissible disciplinary deduction in Auer, though not inadvertent, did not foreclose the availability of the "window of correction" is unremarkable and is totally consistent with the Secretary's position.

Like the Supreme Court in Auer, the Ninth Circuit recently held that the "window of correction" is available to an employer that makes a one-time impermissible disciplinary deduction. See Childers v. City of Eugene, 120

[9] Significantly, the Court spoke broadly of a lack of intent to pay on a "salary basis"; it did not state that only an employer which makes deductions when no work is available demonstrates the absence of such an intent. See Auer, 117 S.Ct. at 912.

F.3d 944, 947 (9th Cir. 1997). As the Supreme Court did in Auer, the Ninth Circuit emphasized the importance of an employer's intention to pay on a "salary basis" before the employer can avail itself of the "window of correction." Thus, in discussing the "window," the court stated that the "FLSA provides a 'window of corrections' defense to employers who unintentionally violate the salary basis test." Childers, 120 F.3d at 947 (emphasis added). The court of appeals, quoting from the district court's decision which it affirmed, stated "that the City's suspension of one exempt employee in ten years reflected a 'decidedly unintentional failure to adhere to §541.118(a)'s requirements,' entitling them to the widow of corrections defense." Ibid.

Moreover, a recent decision of a district court in New York specifically "reject[ed] defendant's argument that, no matter what violations it may have committed, it is entitled to avail itself of the window of correction and can thereby bar plaintiffs' claims by preemptively reimbursing any potentially improper deductions." Hoffmann v. Sbarro, Inc., No. 97 Civ. 4484 (SS), 1997 WL 666292, at *6 (S.D.N.Y. Oct. 23, 1997). The court stated that "while the Supreme

Court [in Auer] did not reach the more difficult issue of what to do in cases of multiple, recurring violations [as opposed to the one unusual improper disciplinary deduction it had before it], the Secretary of Labor, in its Amicus Brief in Auer, explained in no uncertain terms that it does not view the window of correction as available in such circumstances." Id. at *7. The court noted that this interpretation by the Secretary is entitled to no less deference than that accorded by the Supreme Court to her interpretation of the meaning of "subject to reduction," and to her conclusion that the "window" does not require immediate reimbursement. Ibid. Finally, the district court, while deferring a factual determination as to whether there was a "pattern" of improper deductions, concluded "that the Secretary's interpretation, providing that the window of correction is unavailable to employers that have engaged in a 'pattern' of improper deductions, rationally expresses the view that such employers lacked a 'bona fide intent' to treat their employees as exempt." Ibid. But see Davis v. City of Hollywood, 120 F.3d 1178, 1180 (11th Cir. 1997) (without reference to the Secretary's interpretation of the "window of

correction" as set forth in her amicus brief in Auer, the court held that six impermissible disciplinary deductions from 1986 to the present entitled the employer to use the "window" because the deductions were "for reasons other than lack of work"); Arrington v. City of Macon, 973 F. Supp. 1467, 1474 (M.D. Ga. 1997) (also without reference to the Secretary's interpretation of the "window," the court, in the context of the city having made occasional improper deductions pursuant to a settled policy, concluded that "the fact that an employer intentionally makes a deduction from an exempt employee's paycheck which is impermissible under the FLSA does not defeat its right to utilize the window of correction so long as the deduction was made for reasons other than the lack of available work").

The district court in Hoffmann followed the Supreme Court's direction regarding the deference owed to the Secretary's interpretation of her own regulations, and reached the correct result as to the "window of correction." The "window" is simply not available to an employer, like the County, that has made recurring deductions inconsistent with payment on a "salary basis."

## CONCLUSION

For the foregoing reasons, the County's motion for summary judgment regarding the availability of the "window of correction" should be denied, and plaintiffs' motions for summary judgment in connection with that same issue should be granted.

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Respectfully submitted,

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